APPENDIX

MAY 21 1976

Supreme Court of the United States

OCTOBER TERM, 1975

75-839

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Appellant,

against

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent, JAMES MOE, an infant by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER AND EMPIRE STATE PHYSICIANS GUILD, INC.,

Appellees,

and

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT FILED DECEMBER 15, 1975

PROBABLE JURISDICTION NOTED FEBRPARY 23, 1976

INDEX

	PAGE
Relevant Docket Entries—District Court	1a
Complaint (Roe, 73 Civ. 1303)	9a
Complaint (Patient, 73 Civ. 1431)	14a
Affidavit of A. Seth Greenwald	19a
Affidavit of Robert Whelan, M.D.	22a
Sample Prescription	29a
Order Denying Plaintiffs' Motions, etc.	30a
Opinion Denying Plaintiff's Motion for an Order Convening a Three-Judge Court, etc.	32a
Opinion of United States Court of Appeals	41a
Notice of Motion to Dismiss Complaint	54a
Affidavit of A. Seth Greenwald, in Support of Motion	56a
Opinion of Three-Judge Court Denying Plaintiffs' and Defendant's Motion)	57a
Answer	77a
Stipulation (Legislative History)	81a
Chester Hardt Memorandum	83a
Pre-Trial Order on Consent	89a
Exhibit B, What You Should Know About Triplicate Prescriptions	105a
Transcript of Proceedings 12/2/74	110a
Trial Deposition of Dr. Joseph Martin Rosenberg	216a
Trial Deposition of Joseph Jules Wasserman	295a
Trial Deposition of State of New York by Joseph L. Cannizzaro	363a

PAGE

Notice of Motions to Amend the Pre-Trial Order ... 516a

Affidavit of A. Seth Greenwald, in Support of Motion 518a

Exhibit A, Defendant's Amended List of Trial Exhibits 521a

Order Substituting Defendant 523a

Final Order and Judgment (Reproduced at Jurisdictional Statement p. 14a) 524a

Notice of Appeal (Reproduced at Jurisdictional Statement p. 18a) 524a

Opinion Denying Stay, Justice Marshall (Reproduced at Jurisdictional Statement p. 39a) 524a

Relevant Docket Entries—District Court.

73 Civ. 1303 and 73 Civ. 1431

73 Civ. 1303 (Roe v. Ingraham)

DATE	PROCEEDINGS
3/29/73	Filed Complaint and issued Summons (73 Civ. 1303).
4/ 5/73	Filed Affidavit of A. Seth Greenwald; Assistant Attorney General, etc.
4/ 5/73	Filed Memorandum of Law in support of Plaintiff's Motion for a Three Judge Court.
4/ 5/73	Filed Memorandum of Law in opposition to convening a Three Judge Court and to dismiss the Complaint.
4/ 6/73	Filed Plaintiff's Order (ret. 4/6/73).
4/ 6/73	Filed Plaintiff's Order to Show Cause and Temporary Restraining Order (ret. 4/6/73).
4/ 6/73	Filed Plaintiff's ORDER. Ordered that: Plaintiff's motion for an order convening a three judge court pursuant to 28 U.S.C. Sec. 2281 and 2284 is denied; Plaintiff's motion for a preliminary and permanent injunction is denied; the complaint is dismissed for want of substantial federal question; and the temporary restraining order granted on 3/29/73 is dissolved. Execution stayed until 4/9/73 to permit plaintiff to seek a stay and to perfect a new appeal Carter, J. M/N.
4/10/73	Filed Opinion #39394 Motions for preliminary and permanent injunctions are denied and temporary restraining order is dissolved. Complaints are dismissed for want of substantial federal question. So Ordered. Carter, J. M/N.

Relevant Docket Entries—District Court.

DATE	PROCEEDINGS
4/ 9/73	Filed Notice of Appeal.
6/18/73	Filed Defendant's Notice of Motion to Dismiss (ret. 6/25/73).
6/21/73	Filed Memorandum of Law for Defendant to Dismiss Complaint with attached Second Interim Report.
6/25/73	Filed Plaintiff's reply memorandum in support of motion for a preliminary injunction and in opposition to Defendant's motion to Dismiss.
6/ 8/73	Filed Opinion and true copy of USCA mandate: Ordered that the District Court Order dismissing the complaint is reversed with instructions; costs taxed against appellee (no bill of costs attached) (Also in 73 Civ. 1431 RLC) (Entered 7/14/73) M/N.
8/27/73	Filed opinion #39786—heard before a Three Judge Panel—The defendant's motion to dismiss is denied. The motion for preliminary injunction is denied and the restraining order heretofore entered is vacated. So Ordered. Judges Feinberg (Cir. Judge), Wyatt and Carter. M/N
10/16/73	Filed defendants Answer to complaint (also 73-1431).
7/ 3/74	Filed Stipulation and Order that, for purposes of the above entitled action, the documents indicated herein constitute the legislative history of the sections in Article 33 of the New York Public Health Laws, etc. Carter, J.

Relevant Docket Entries—District Court.

DATE	PROCEEDINGS
11/21/74	Filed consent pretrial order—Carter, J.
11/22/74	Filed consent pretrial order (#2) Carter, J.
11/27/74	Filed Defendant's trial memorandum.
11/27/74	Filed order that the trial (Three Judge Court; Feinberg, (J. Wyatt, J. and Carter, J.) will be held on 12/2/74. Ordered that the parties shall submit trial memoranda by 11/27/74. Original to be filed with the Clerk of the Court, copies thereof delivered to each member of the Three Judge Court—Carter, J. M/N
11/27/74	Filed Plaintiffs' and Intervenors' Trial memorandum.
11/27/74	Filed order designating the following judges in addition to Judge Carter, to hear and determine cause: Wilfred Feinberg, C.J. and Inyer B. Wyatt, J.—Kaufman, Ch. J.—C.A.
12/ 2/74	Filed consent pretrial order that 73 Civ. 1431 shall be consolidated for trial and tried jointly with this proceeding—Carter, J.
12/ 3/74	Filed Plaintiffs' memorandum of law in support for a preliminary injunction.
12/ 3/74	Filed reply memorandum in support of plaintiffs' motion for a preliminary injunction and in opposition to defendant's motion to dismiss the complaint.
1/29/75	Filed Plaintiffs' memorandum in support of motion for a Three Judge Court and T.R.O.

Relevant Docket Entries—District Court.

DATE	PROCEEDINGS
1/29/75	Filed Defendant's memorandum of law in opposition to motion to convene a Three Judge Court and to dismiss.
2/28/75	Filed Transcript of Record of Proceedings dated December 2, 1974—(also in 73 Civ. 1431).
3/28/75	Filed Defendant's post trial memorandum (also for 73-1431).
3/28/75	Filed Plaintiffs' post trial brief with proposed Findings of Fact and Conclusions of Law (also for 73-1431).
3/28/75	Filed Intervenors' post trial memorandum of law.
4/ 1/75	Filed Plaintiffs' reply post trial brief.
4/11/75	Filed Defendant's affidavit and notice of motion to amend pre-trial order as indicated and for judgment in favor of defendant on the close of plaintiffs' prima facie case, etc. (returnable 4/25/75).
4/11/75	Filed deposition of Joseph A. Bonacci on 12/6/74 M/N.
4/11/75	Filed deposition of State of New York by Joseph L. Cannizzaro on 12/5/74 M/N.
4/22/75	Filed Plaintiffs' affidavit in opposition to certain portions of defendant's motion to amend.
4/22/75	Filed deposition of Dr. Jerry Martin Rosenberg taken on 12/4/74.
4/22/75	Filed deposition of Joseph Jules Wasserman, a witness taken on 12/4/74.

Relevant Docket Entries—District Court.

DATE	PROCEEDINGS
4/22/75	Filed transcript of record of proceedings dated 12/2/74 (copy and not certified).
7/28/75	Filed memo endorsed on defendant's motion to amend pre-trial: Defendant's motion to amend pretrial order to include exhibit A-N inclusive is granted. Defendant's motion to exclude the testimony of Joseph Wasserman and to grant judgment to defendant at the close of plaintiffs' prima facie case is denied. So Ordered—Carter, J. (for 73-1303 and 73-1431).
8/13/75	Filed Opinion #42959 Three Judge Court holding that so much of sections 3331(b), 3332(2) and 3334(4) of the New York Public Health Law as requires reporting to a state authorities. The names and addresses of patients who receive Schedule II drugs and medication is an unconstitutional interference with plaintiffs' rights of privacy guaranteed under the 16th Amendment. The decision makes unnecessary an evaluation of the state measures to insure confidentiality. Settle order and notice. Judges Feinberg, Wyatt and Carter. M/N.
9/17/75	Filed Plaintiffs' affidavit of Michael Lesch in support of Plaintiffs proposed judgment.
10/ 3/75	Filed affidavit and order substituting Robert P. Whalen Commissioner of Health of the State of New York as defendant in place of his predecessor, Hollis S. Ingraham. Carter, J.

Relevant Docket Entries—District Court.

DATE	PROCEEDINGS
10/ 9/75	Filed Final Order and Judgment that sections 3331(6), 332(2)(a) and 333(4) of the New York Public Health Law, insofar as they require disclosure to the State of New York the identity of patients receiving prescriptions for Schedule II controlled substances are declared unconstitutional, etc. Defendant's are enjoined from enforcing said provisions. Paragraphs 3 and 4 of this judgment are stayed on condition that defendant timely file a notice of appeal to the U.S. Supreme Court. Feinberg, C. J., Wyatt, J. & Carter, J. Judgment entered—Clerk M/N.
10/20/75	Filed Defendant's notice of appeal to the U.S. Supreme Court.
10/21/75	Filed order (with letter attached) that Defendant's letter of 10/16/75 is treated as a motion for further stay of the order of 10/9/75. Motion for a further stay is denied —Feinberg, C.J., Wyatt, J. and Carter, J. M/N.
11/ 5/75	Filed letter by Supreme Court of the U.S. Office of the Clerk, dated 10/30/75, forwarding copy of opinion by Justice Marshall dated 10/28/75.
11/ 5/75	Filed copy of Justice Marshall's memorandum opinion of 10/28/75, denying the application for a stay in this action.

Relevant Docket Entries—District Court.

73 Civ. 1431 (Patient v. Ingraham)

DATE	PROCEEDINGS
4/ 4/73	Filed complaint and issued summons (73 Civ. 1431).
4/12/73	Filed Plaintiffs' notice of appeal.
4/19/73	Filed transcrpit of record proceedings dated April 6, 1973.
4/19/73	Filed Notice to Docket Clerk that record on appeal has been certified and transmitted to USCA on 4/19/73.
6/ 8/73	Filed opinion and true copy of USCA mandate—same as 73-1303; reversing order of the District Court and ordering a Three Judge Court.
10/16/73	Filed Defendant's answer to complaint.
11/27/74	Filed order—same as 73-1303; setting trial date and date for submitting memoranda.
11/27/74	Filed order—same as 73-1303, designating members of Three Judge Court.
12/ 2/74	Filed consent pretrial order—same as 73-1303, ordering consolidation with 73-1303, Carter, J.
2/28/75	Filed transcript of record of proceedings dated 12/2/74.
3/28/75	Filed Defendant's post trial brief (73-1303).
3/28/75	Filed Plaintiffs' post trial brief (73-1303).
4/ 1/75	Filed Plaintiffs' post trial memorandum of law.

Relevant Docket Entries—District Court.

DATE	PROCEEDINGS
8/13/75	Filed Opinion #42959—same as in 73-1303 holding the challenged sections of the N Y Public Health Law, to be unconstitutional as a violation of the Right to Privacy.
9/17/75	Filed affidavit of Michael Lesch in support of plaintiff's proposed judgment. (73-1303)
10/ 8/75	Filed Final Order and Judgment—same as 73-1303.
10/21/75	Filed order that Defendant's motion for a stay is denied. (73-1303)

Complaint (Roe, 73 Civ. 1303).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD ROE, an infant, by Robert Roe, his parent, JOHN DOE, an infant, by Mary Doe, his parent, JAMES MOE, by Michael Moe his parent, JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

against

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York,

Defendant.

Plaintiffs, by their attorneys Shea Gould Climenko & Kramer and Solomon Z. Ferziger, for their complaint herein, allege as follows:

1. This is a civil action brought by the plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against enforcement of those provisions of Article 33 of the New York Public Health Law (referred to hereinafter as the "Act") which require physicians to record, on prescriptiton forms to be filed with the State of New York, the identity of patients using medications set forth in Schedule II of Section 3306 of the Act (referred to hereinafter as "Schedule II controlled substances") and to declare such requirement violative of the Fourteenth Amendment of the United States Constitution.

2. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. Sections 1343(3), 2281, 2201 and 2202.

3. Each of the individual plaintiffs is a citizen of the United States, a resident of New York State and at least one resides in the Southern District of New York.

4. Plaintiffs Richard Roe, Joe Doe and James Moe (who are infants appearing by their parents) and Jane Poe are patients regularly receiving prescriptions for medications listed on Schedule II of Section 3306 of Article 33 of the New York Public Health Law. The aforesaid plaintiffs are suing under fictitious names to avoid public disclosure of their identity.

5. Plaintiffs Matthew T. Brody and Israel L. Schmierer are physicians who, in the course of their practices, prescribe for recognized medical purposes, drugs listed on Schedule II of Section 3306 of Article 33 of the New York Public Health Law.

6. Plaintiff Empire State Physicians Guild, Inc. is a Membership Corporation organized and existing under the laws of the State of New York.

7. Defendant Hollis S. Ingraham is Commissioner of Health of the State of New York and is sued herein in that capacity.

8. On June 8, 1972, Governor Nelson A. Rockefeller signed into law, Laws of New York 1972, Chapter 878, entitled "An Act to amend the public health law and the penal law, in relation to controlled substances and dangerous drugs, and repealing articles thirty-three, thirty-three-A and thirty-three-B of the Public Health Law, and section 220.00 of the penal law in relation thereto." (The text of the Act is set forth herein as Appendix A.) By its terms the Act becomes effective on April 1, 1973.

9. The Act on its face and as construed and applied by defendant requires (1) that, except as expressly authorized by a provision for emergency oral prescriptions, all Schedule II controlled substances may be prescribed or dispensed only upon an official New York State prescription (Section 3338(2)); (2) that such prescription shall be prepared in triplicate and the original and both copies shall contain, *inter alia*, the name, address and age of the ultimate user for whom the substance is intended (Section 3332(2)); (3) that if a physician dispenses the substance, he shall keep the original prescription and forward two copies to the Department of Health (Section 3331(6)) and if a physician prescribes the substance, he shall retain one copy of the prescription, transmit the original and one copy of the pharmacist who retains the original and files the copy with the Department of Health (Section 3333(4)); and (4) that the Department of Health may make disclosure of the information contained on such prescriptions to, *inter alia*, any "person who by virtue of his office is entitled to obtain such information" (Section 3371(1)(a)).

10. In or about January 1973, the Commissioner of Health promulgated certain rules and regulations with respect to controlled substances pursuant to authority therefore in the Act.

11. The Act on its face, and as construed and applied, violates the Fourteenth Amendment of the United States Constitution in that, by requiring disclosure of the identity of certain patients it invades the patient's right of privacy and confidentiality, infringes on the doctor's right to prescribe treatments for his patients solely on the basis of medical considerations and discriminates against persons suffering from certain diseases by requiring their identification to a governmental agency as a condition to receiving medical treatment for their illnesses.

12. This suit involves a genuine case of controversy between plaintiffs and defendant.

13. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

WHEREFORE, plaintiffs pray that the following relief be granted:

1. That a three-judge court be convened as provided in 28 U.S.C. Sections 2281 and 2284 to declare unconstitutional and enjoin the enforcement of Sections 3331(6), 3332(2) (a) and 3333(4) of the Act insofar as they require disclosure to the State of the identity of patients using Schedule II controlled substances.

2. That the defendant, his agents, servants and employees

(a) be enjoined from distributing New York State prescription forms requesting the identity of patients receiving prescriptions for Schedule II controlled substances;

(b) be enjoined from accepting for filing New York State prescription forms containing the identity of patients receiving prescriptions for Schedule II controlled substances;

(c) be enjoined from requiring physicians or pharmacists to complete and file prescription forms containing the identity of patients receiving prescriptions for Schedule II controlled substances; and

(d) be ordered to destroy any New York State prescription forms previously filed containing the identity of patients receiving prescriptions for Schedule II

controlled substances and any records made therefrom.

3. That an injunction, *pendente lite*, be granted to the plaintiffs against the defendant, his agents, servants and employees for the relief sought in paragraphs 2(a), (b) and (c) hereinabove and ordering that defendant, his agents, servants and employees deposit in the registry of this Court any New York State prescription forms previously filed containing the identity of patients receiving prescriptions for Schedule II controlled substances and any records made from such forms.

4. That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

Dated: New York, New York, March 28, 1973.

SHEA GOULD CLIMENKO & KRAMER

By MICHAEL LESCH
A Member of the Firm

and

SOLOMON Z. FERZIGER, Esq.

Attorneys for Plaintiffs.

Complaint (Patient, 73 Civ. 1431).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Plaintiffs,

—against—

HOLLIS S. INGRAHAM, as Commisioner of Health of the State of New York,

Defendant.

Plaintiffs, by their attorneys, Norwick, Raggio & Jaffe, as cooperating attorneys for the New York Civil Liberties Union, for their complaint, allege as follows:

1. This is a civil suit by the plaintiffs, on their own behalf and on behalf of others similarly situated, for a temporary and permanent injunction against enforcement of those provisions of Article 33 of the New York Public Health Law (referred to hereinafter as the "Act") which require physicians to record, on prescription forms to be filed with the State of New York, the identity of patients using medications set forth in Schedule II of Section 3306 of the Act (referred to hereinafter as "Schedule II controlled substances") and to declare such requirement violative of the Fourteenth Amendment of the United States Constitution.

2. Jurisdiction is conferred upon this court pursuant to 28 U.S.C. 1331, 1343(3), 2281, 2201 and 2202 as well as

by 42 U.S.C. 1983 and by the Commerce Clause of the United States Constitution, Article 1, Section 8 and by the Fourteenth Amendment of the United States Constitution.

3. The amount in controversy in this action is in excess of $10,000.

4. Each of the individual plaintiffs is a citizen of the United States, a resident of New York State and at least one resides in the Southern District of New York.

5. Plaintiff George Patient is a patient regularly receiving prescriptions for medication listed on Schedule II, namely, Hycodan and Percodan, in treatment for his conditions resulting from his status as a post-operative cancer patient. Plaintiff Martha Patient is a patient regularly receiving prescriptions for medication listed on Schedule II, namely Demerol, in treatment of a migraine condition. These plaintiffs are suing under fictitious names to avoid public disclosure of their identity.

6. Plaintiff Lustig is a physician who in the course of his practice prescribes for recognized medical purposes drugs listed on Schedule II and who has prescribed Schedule II drugs for plaintiff George Patient.

7. Plaintiff American Federation of Physicians and Dentists is an unincorporated association of physicians and dentists.

8. Defendant Hollis S. Ingraham is Commissioner of Health of the State of New York and is sued herein in that capacity.

9. On June 8, 1972, Governor Nelson A. Rockefeller signed into law, Laws of New York 1972, Chapter 878, en-

titled "An Act to amend the public health law and the penal law, in relation to controlled substances and dangerous drugs, and repealing articles thirty-three, thirty-three-A and thirty-three-B of the Public Health Law, and section 220.00 of the penal law in relation thereto." (The text of the Act is set forth herein as Appendix A.) By its terms the Act becomes effective on April 1, 1973.

10. The Act on its face and as construed and applied by defendant requires (1) that, except as expressly authorized by a provision for emergency oral prescriptions, all Schedule II controlled substances may be prescribed or dispensed only upon an official New York State prescription (Section 3338(2)); (2) that such prescription shall be prepared in triplicate and the original and both copies shall contain, *inter alia,* the name, address and age of the ultimate user for whom the substance is intended (Section 3332(2)); (3) that if a physician dispenses the substance, he shall keep the original prescription and forward two copies to the Department of Health (Section 3331(6)) and if a physician prescribes the substance, he shall retain one copy of the prescription, transmit the original and one copy to the pharmacist who retains the original and files the copy with the Department of Health (Section 3333(4)); and (4) that the Department of Health may make disclosure of the information contained on such prescriptions to, *inter alia,* any "person who by virtue of his office is entitled to obtain such information" (Section 3371(1)(a)).

11. In or about January 1973, the Commissioner of Health promulgated certain rules and regulations with respect to controlled substances pursuant to authority therefor in the Act.

12. The Act on its face, and as construed and applied, violates the Fourteenth Amendment of the United States

Constitution in that, by requiring disclosure of the identity of certain patients it invades the patient's right of privacy and confidentiality, infringes on the doctor's right to prescribe treatments for his patients solely on the basis of medical considerations and discriminates against persons suffering from certain diseases by requiring their identification to a governmental agency as a condition to receiving medical treatment for their illnesses.

13. The Act on its face conflicts with, is inconsistent with and overlaps federal law and federal regulation and is thus void, being in conflict with the commerce power of the United States government and the laws and regulations enacted by the United States pursuant thereto.

WHEREFORE, plaintiffs pray that the following relief be granted:

1. That a three-judge court be convened as provided in 28 U.S.C. 2281 and 2284 to declare unconstitutional and enjoin the enforcement of Section 3331(6), 3332(2)(a) and 3333(4) of the Act in so far as they require disclosure to the State of the identity of patients using Schedule II controlled substances.

2. That the defendant, his agents, servants and employees

(a) be enjoined from distributing New York State prescription forms requesting the identity of patients receiving prescriptions for Schedule II controlled substances;

(b) be enjoined from accepting for filing New York State prescription forms containing the identity of patients receiving prescriptions for Schedule II controlled substances;

(c) be enjoined from requiring physicians or pharmacists to complete and file prescriptiton forms containing the identity of patients receiving prescriptions for Schedule II controlled substances; and

(d) be ordered to destroy any New York State prescription forms previously filed containing the identity of patients receiving prescriptions for Schedule II controlled substances and any records made therefrom.

3. That an injunction, *pendente lite,* be granted to the plaintiffs against the defendant, his agents, servants and employees for the relief sought in paragraphs 2(a), (b) and (c) hereinabove and ordering that defendant, his agents, servants and employees deposit in the registry of this Court any New York State prescription forms previously filed containing the identity of patients receiving prescriptions for Schedule II controlled substances and any records made from such forms.

4. That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

Dated: New York, New York, April , 1973.

NORWICK, RAGGIO & JAFFE

By .....
A Member of the Firm

Affidavit of A. Seth Greenwald.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD ROE, an infant by ROBERT ROE, his parent, JOHN DOE, an infant by MARY DOE, his parent, JAMES MOE, an infant by MICHAEL MOE, his parent, JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER, and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

against

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York,

Defendant.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

A. SETH GREENWALD, being duly sworn, deposes and says:

I am an Assistant Attorney General in the Office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant and make this affidavit to present several pertinent procedural considerations to the court.

I.

The institution of the law suit with fictitious names raises the question considered in *Roe* v. *State of New York,* 49 F.R.D. 279, 8 A.L.R. Fed. 670 (S.D.N.Y. 1970). Since the "Roes", "Does" and "Moes" are the real parties in interest the Court and the defendant should be given the names of same to insure the existence of actual contro-

versy. This can be accomplished by the filing of an affidavit containing the true name and identity of the fictitious plaintiffs. This was done in *Doe* v. *Lavine,* 72 Civ. 2517 (S.D.N.Y.). After this is done, your deponent has no objection to taking whatever steps necessary to insure continued anonymity.

It should be pointed out that Dr. Schmierer may well have named several of the infant plaintiffs in his affidavit. Mentioned therein are Howard Goldstein and James Maiorana.

II.

On March 29, 1973, this Court issued a general temporary restraining order against defendant. However this is not a class action and plaintiffs make none of the required recitals in their complaint, except that it is on "behalf of all others similarly situated" (par. "1"). In all other respects it fails to comply with Rule 23, F.R.C.P. In particular we wonder whether the representative parties adequately represent the class. 23(a)(4). The partys' attorney must be qualified, experienced and generally able to conduct the proposed litigation. *Eisen* v. *Carlisle & Jacquelin,* 391 F. 2d 555, 562 (2d Cir. 1968). We do not contend plaintiffs' attorneys are not but, on the other hand, they have not so affirmatively stated.

In view of the lack of a class action, Rule 23, the t.r.o. should immediately be limited to plaintiffs' prescriptions and no others. Also no pharmacists are represented so that the plaintiffs should not purport to seek relief on their behalf.

In sum, this action should not be treated as a class action unless there is compliance with Rule 23.

III.

In view of the confusion engendered by the original t.r.o. with the subsequent modification, we urge that this action, if it is to be dismissed, be done with expedition. If, as we contend, the public health is endangered by the continuation of any restraints on the law, this Court should not extend the t.r.o. and quickly decide the case. We believe that at this time the plaintiffs have not shown any harm by letting the law go into complete operation. They only express conjectures and vague fears in the distant future. If they are, by chance, successful, full relief can be rendered at that time. However at this time there is no need for relief since it is not the recording of data that is a possible invasion of privacy but the ultimate revelation of same. Of course, we contend this will not occur and if the plaintiffs took the effort to fully investigate defendant's proposed procedures they would have been aware of this. Rather they have acted out of fear, unsupported by facts.

WHEREFORE, your deponent respectfully requests that plaintiffs' motion be denied, the temporary restraining order dissolved, and the complaint dismissed with all possible dispatch.

(Sworn to by A. Seth Greenwald, April 4, 1973.)

Affidavit of Robert Whalen, M.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD ROE, et al.,

Plaintiffs,

v.

HOLLIS S. INGRAHAM, M.D.,

Defendant.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

ROBERT WHALEN, M.D. being duly sworn deposes and says:

Deponent is the Second Deputy Commissioner of the New York State Department of Health and in such capacity has the direct responsibility under the Commissioner of Health for Department policy relating to controlled substances.

Chapter 878 of the Laws of 1972 enacting a new Article 33 to the Public Health Law was signed by Governor Rockefeller June 8, 1972.

The legislation was the result of extensive investigation by the Temporary Commission to Evaluate the Drug Laws into pertinent medical practice, extent of abuse, and avenue of diversion of legal drugs. Hearings were conducted throughout the State and the opinions of hundreds of experts were solicited.

The Department has proceeded to implement the provisions of the law including the requirement of a triplicate prescription. The procedural steps are as follows:

Upon the application by a practitioner, official New York State prescription forms are issued in groups of one hun-

dred serially numbered forms. For prescribing or dispensing a Schedule II substance, the practitioner will use the triplicate form. If he dispenses the substance, he will keep the original and forward two copies to the Department. If he prescribes the substance, he will give the patient the original and one copy. The patient will take both the original and the copy to the pharmacy. The pharmacist filling the prescription will sign his name upon the original and the copy and will note the date of delivery, and the registration number of the pharmacy. He will then, by the fifteenth of the following month, send the endorsed copy to the Department. He will retain the original for five years.

Once the Department has received the copies, it will be able to compile data which will uncover irregularities such as forgeries, fraudulent obtaining of Schedule II substances, and thefts of prescription blanks and their misuse by unauthorized persons. The information received by the Department will show if a patient has obtained prescriptions by going from doctor to doctor, or if stolen prescriptions are being used. This procedure will also indicate where there is a possibility of over-prescribing or over-dispensing of Schedule II drugs.

Drug abusers operate in part through legitimate medical channels. Prescriptions are raised and refilled repeatedly and ficititious patient names are used. Individual patients go to more than one physician for drug prescriptions to be used for nonmedical needs and there are instances of over-prescribing.

At the time this proceeding was commenced over 23,000 practitioners had submitted orders and been mailed triplicate prescription forms. Such forms have been ordered by and mailed to approximately 300 institutions in New York State.

The requirement for a triplicate prescription is one part of the broad control mechanism of narcotics, depressants, stimulants and hallucinogens provided for in Article 33.

The need for control has long been recognized and policies relating to socially condemned drugs date back at least to the Federal Harrison Anti-Narcotic Act of 1914, which required that doctors be registered under the Act and made the manner of securing drugs a matter of record. The original goal was to make the entire process of distribution in America a matter of record. A series of Federal acts continued such controls, the most recent of which is the Federal Controlled Substances Act of 1970. A similar pattern prevailed in the states with a Uniform Narcotics Act enacted in most of the states. Controls in New York State go back to about World War I and a basic Uniform Narcotic Drug Act was enacted in New York State in 1933.

THAT the Uniform Narcotic Drug Act, as enacted in New York State in 1933, requires that the full name and address of the patient be on the prescription. This requirement has existed until the present time in both the Public Health Law (Public Health Law § 3301 (32) and in the Federal Regulations (21 CFR § 306.05). The identity of the patient on the label has also been a requirement of both the State and Federal Laws.

THAT there is a need for control has been thoroughly documented. To review the statements and acts of President Nixon and Governor Rockefeller would be to repeat generally known information as to abuses and efforts made to curb such abuses. It would be difficult to envision a system of controls that would be effective which did not require a physician to identify the patient for whom a drug is prescribed.

Information as to the identity of patients has always been required and has been available as limited by the statute. Records required by the control provisions existing prior to April 1, 1973 are confidential and are only open to inspection by "federal, state, county and municipal officers,

whose duty it is to enforce the laws of the state or of the United States relating to narcotic drugs". The law effective April 1, 1973 does not make available information that was not available prior to April 1 and, as a matter of fact, places a greater cloak of confidentiality over this information. Public Health Law § 3371 prohibits disclosure by Department personnel except (1) pursuant to judicial subpoena or court order, (2) to agencies licensing persons authorized to deal in controlled substances and (3) to another person who by virtue of his office is entiled to obtain such information. This last exception is to allow disclosure internally within the Department to those with a controlled substance responsibility. The Temporary Commission to Evaluate the Drug Law stated in its interim report that "this would relate primarily to intra-departmental communications". The section further provides that where such information is disclosed in a proceeding the court shall insure that such information is not made public.

The Department is experienced in dealing with confidential data and gathers information, reports and statistics in such diverse areas as venereal disease, tuberculosis, cancer and medical rehabilitation and is the custodian of birth, death, fetal death, marriage and dissolution of marriage records. All Department staff and persons with duties requiring access to Department records are instructed to treat as confidential any information or data received or developed in the performance of their duties. Utmost care will be taken with respect to triplicate prescriptions to insure that only Department personnel with specific Controlled Substances functions have access to the information.

The pharmacists are provided with preaddressed envelopes to mail to the Department the copies of the prescriptions. The copies received by the Department, as well as the tapes or punch cards produced from them will be given special handling and kept in locked, secured areas

while not in use, with access thereto strictly circumscribed by the Commissioner. There will be no massive print out of patient names but, on the contrary, the availability of such information will be severely limited. Attached are detailed statements of Department procedures and policies on both security and confidential information.

Deponent has read the papers in this proceeding and it would appear that in many instances affiants are reading or interpreting the statute incorrectly.

The identity of the patient is required in the case of addicts and habitual users. The practitioner is not required to file the original and a copy of the individual official prescription required by Public Health Law § 3331 (6) for the treatment of addiction maintenance because § 3355 of the Public Health Law has specific reporting requirements for maintenance programs including the identity of the patient and the amount of drugs administered or dispensed. There is no discrimination between addicts and habitual users on the one hand and others for whom drugs may be prescribed.

The purpose of collecting copies of the prescriptions centrally is to increase the efficiency of the controls mandated by Article 33. The filing of the prescription does not indicate the medical condition for which the drug was prescribed, is not a recording of illness, does not impair the patient-doctor relationship and certainly does not result in ridicule, abuse or blackmail.

The affidavits of the physician in support of the injunction support a medical use for the drugs prescribed. That Schedule II drugs have a medical use is not in question. The schedules as set forth in the Public Health Law range from Schedule I, having no currently accepted medical use and a high potential for abuse to Schedule V which has a currently accepted medical use and a low potential for abuse. Schedule II drugs have a currently accepted medical use with severe restrictions and a high potential for abuse requiring strict controls.

A similar multiple prescription procedure has been in effect in California since 1940, in Illinois since 1958 and in Idaho since 1967. Experience indicates that computer accessibility of such information uncovers such irregularities as forgeries, fraudulent obtaining of narcotic drugs, theft of prescription blanks and their misuse by unauthorized persons and other abuses. To the best of deponent's knowledge no litigation in those states has questioned the disclosure of the identity of the person for whom the prescription is written.

The availability of such information to another person who by virtue of his office is entitled to obtain such information, as provided for in Public Health Law § 3371, heavily relied on by petitioners, is only to allow disclosure internally within the Department as set forth earlier in this affidavit.

It is unlawful for any person to administer or dispense a controlled substance except as expressly allowed by Article 33 of the Public Health Law. Specifically provided for to enable Schedule II controlled substances to be administered or dispensed is the official triplicate prescription. The elimination of such provision would prevent such substances from being administered or dispensed in the State of New York, there being no statutory alternative, and would create a vacuum.

The temporary restraining order has created confusion among practitioners and pharmacists. Many are under the mistaken belief that they need not comply with the triplicate prescription requirements of Article 33. Professional confusion is to the detriment of the health care needs of the citizens of New York State.

This affidavit is made in opposition to the request of the plaintiffs for a preliminary injunction and in opposition to the continuance of the temporary restraining order.

(Sworn to by Robert P. Whalen, M.D., April 3, 1973.)

Sample Prescription.

(See opposite ☞)

DISPENSER: RETAIN ONE COPY. SEND OTHER TO NEW YORK STATE HEALTH DEPARTMENT, BUREAU OF NARCOTIC CONTROL, 845 CENTRAL AVE., ALBANY, N. Y., 12206 BY 15TH OF NEXT MONTH. THIS RX MUST BE FILLED IN 30 DAYS

NOTE: Prescription must show quantity to be taken per dose, number of doses daily, and total quantity prescribed.

THIS SECTION TO BE COMPLETED BY DISPENSER

PHARMACY Rx NUMBER | DATE Rx FILLED MO DAY YR.

SCHEDULE II SUBSTANCE NDC NO.

PHARMACY BNDD NUMBER

DISPENSER SIGNATURE

A 0900203

FOR SINGLE PRESCRIPTION ONLY
PLEASE PRINT

Rx

MAXIMUM DAILY DOSAGE

PRACTITIONER SIGNATURE

New York State Prescription MC-77 (8/73)

PRACTITIONER NAME AND ADDRESS

TEL NO.

PRACTITIONER BNDD NUMBER

Rx DATE MO. DAY YR.

PATIENT LAST NAME | FIRST | AGE

PATIENT ADDRESS

ZIP

NEW YORK STATE HEALTH DEPARTMENT - Official New York State Prescription

Sample Prescription

BEST COPY AVAILABLE

Order Denying Plaintiffs' Motions, etc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1303 (RLC)

RICHARD ROE, an infant by ROBERT ROE, his parent, JOHN DOE, an infant by MARY DOE, his parent, JAMES MOE, an infant by MICHAEL MOE, his parent, JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

—against—

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York,

Defendant.

ORDER

Plaintiffs having applied for an order convening a three judrge court, pursuant to 28 U.S.C. §§ 2281 and 2284, on the ground that plaintiffs seek an interlocutory and permanent injunction restraining the enforcement, operation and execution of a state statute by restraining the action of an officer of such state upon the ground of the unconstitutionality of such statute and for an order enjoining defendant, his agents, servants and employees from enforcing those provisions of Article 33 of the New York Public Health Law, and this Court having previously granted an order restraining enforcement of certain provisions of Article 33 of the New York Public Health Law pending determination of plaintiffs' application for an order convening a three judge court and for a permanent injunction;

Order Denying Plaintiffs' Motions, etc.

AND defendant having opposed said motion, it is hereby

ORDERED that plaintiffs' motion for an order convening a three judge court pursuant to 28 U.S.C. §§ 2281 and 2284 be, and it hereby is, denied; and it is further

ORDERED that plaintiffs' motion for preliminary and permanent injunction is denied and complaints dismissed for want of a substantial federal question.

ORDERED that the temporary restraining order granted herein on March 29, 1973 be and is hereby dissolved. Execution stayed until 12 noon on Monday, April 9, 1973 to permit plaintiff to seek a stay and to perfect their appeal to the United States Court of Appeals.

Dated: New York, New York
April 6, 1973

s/ ROBERT L. CARTER
U.S.D.J.

Opinion Denying Plaintiff's Motion for an Order Convening a Three-Judge Court, etc.

Richard Roe, an infant by Robert Roe, his parent, et al., Plaintiffs,
and
George Patient et al., Intervenors,

v.

Hollis S. Ingraham, as Commissioner of Health of the State of New York, Defendant.

No. 73 Civ. 1303.

United States District Court, S. D. New York.

April 10, 1973.

Robert L. Carter, District Judge:

Opinion

The plaintiffs have made a narrow attack upon the comprehensive New York Controlled Substances Act, N.Y. Public Health Law § 3300 et seq. (McKinney's Consol. Laws, c. 45 Supp.1972), which attempts to regulate virtually all facets of the use and distribution of drugs in this state for which a prescription is required. The plaintiffs object only to those sections, specifically §§ 3331(6),[1] 3332(1), (2)(a),[2]

---

[1] "§ 3331 Scheduled substances administering and dispensing by practioners.

• • • • •

6. A practitioner dispensing a substance which may be prescribed only upon an official New York state prescription must at the time of such dispensing prepare an official New York prescription in the manner set forth in subdivision two of section

(*footnte continued on following page*)

Opinion Denying Plaintiff's Motion for an Order Convening a Three-Judge Court, etc.

(4),[3] 3338(2),[4] which, in combination, require physicians and pharmacists to file with the state copies of prescriptions for certain drugs which are described in detail in the

---

(*footnote continued from preceding page*)

thirty-three hundred thirty-two of this article. The practitioner shall retain the original for a period of five years and shall file the two copies with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered. . . ."

[2] "§ 3332 Making of official New York state prescriptions for scheduled substances.

1. No substance for which an official New York state prescription is required may be prescribed by a practitioner except on an official New York state prescription, and in good faith and in the course of his professional practice only.

2. Such prescription shall be prepared in triplicate, written with ink, indelible pencil or, apart from the practitioner's signature, typewriter. The original and both copies must contain the following:

(a) the name, address, and age of the ultimate user for whom the substance is intended. . . ."

[3] "§ 3333 Dispensing upon official New York state prescription.

1. A licensed pharmacist may, in good faith, and in the course of his professional practice, sell and dispense to an ultimate user controlled substances for which an official New York state prescription is required only upon the delivery to such pharmacist, within thirty days of the date such prescription was signed by an authorized practioner, of the original and one copy of such official New York state prescription.

• • • • •

4. The endorsed original prescription shall be retained by the proprietor of the pharmacy for a period of five years. The endorsed copy of such prescription shall be filed with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered."

[4] "§ 3338 official New York state prescription forms.

• • • • •

2. Except as expressly authorized by section thirty-three hundred thirty-four, substances listed in schedule II may be prescribed or dispensed only upon an official New York state prescription. . . ."

statute under the heading of "Schedule II" drugs, § 3306. Concededly, although the statute does not require it, the state will enter the information it receives, including the name of the patient for whom the drug is prescribed, into a computer file. It is this mechanized collation of data, pursuant to which the state will have on file the names and addresses of patients who are users of prescribed drugs, that constitutes the gravaman of plaintiffs' complaint.

On March 29, 1973 the plaintiffs[5] petitioned this court for an order to show cause on a motion to convene a three judge court pursuant to 28 U.S.C. §§ 2281, 2284 on the ground that plaintiffs sought preliminary and permanent injunctions restraining the implementation of certain sections of the New York Controlled Substances Act (which was to become effective on April 1, 1973), which were allegedly constitutionally infirm. The plaintiffs further sought a temporary restraining order which would stay implementation of the Act pending determination of the merits. The court heard all counsel and signed the order[6] setting oral argument for Friday, April 6, 1973.

---

[5] Counsel for plaintips George Patient, et al., petitioned this court on April 3, 1973 to intervene in the principle action. There being no objection by counsel in the *Roe* action, the motion was granted on April 6, 1973 and reference to "plaintiffs" hereinafter includes the intervenors.

[6] The temporary restraining order did not enjoin the implementation of the entire act. Rather it ordered, in substance, that the defendant was restrained from:

1. filing or processing prescription forms identifying the patients receiving Schedule II drugs;

2. requiring physicians or pharmacists from filing prescription forms identifying the patients receiving Schedule II drugs;

and ordered that the defendant retain in a secure place any prescription forms received during the pendency of the temporary restraining order.

Plaintiffs make a two pronged attack on the legislation. First, it is argued that the statute is an unconstitutional invasion of the patient's right to privacy, and second, that the statute creates classifications which do not comport with the dictates of the equal protection clause.

I consider first the equal protection argument. The law in this complex area is currently in a state of flux, see, e. g., Gunther, The Supreme Court 1971 Term foreword: In Search of Evolving Doctrine on a Changing Court, 86 Harv. L.R. 1 (1972), as evidenced by such cases as James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); and Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

The Court of Appeals in this Circuit has recently characterized the appropriate test as "whether the legislative classification is *in fact* substantially related to the object of the statute." Boraas v. The Village of Belle Terre (2d Cir. 1973), 476 F.2d 806 at 814.

Applying this test I find no constitutional infringement that can be said to pose a substantial federal question. It is of course true, that patients legitimately receiving Schedule II drugs are treated differently than those who are either receiving Schedule III, IV or V drugs, those receiving no drugs at all, or those who are classified as addicts. But this is only improper if the treatment afforded Schedule II users does not substantially further the ends of the statute.

It is rarely easy to pinpoint with precision a statute's "purposes." Here the goal is obviously at least in part to control certain illegal drug uses by doctors, pharmacists

and patients. The plaintiffs intimate that the more lenient reporting standards required of Schedules III, IV and V users make the statute underinclusive and therefore void. This conclusion however results from a misstatement of purpose rather that a defect in the statute. As explained in the Memorandum of Assemblyman Chester Hardt, Chairman of the Temporary State Commission to Evaluate the Drug Laws, the state, by choosing to rely on voluntary and virtually unreviewed compliance with the law as it pertains to the less dangerous drugs of Schedules III, IV and V, sought not only to control drugs effectively but also to limit the intrusion into personal affairs. Thus restricting the new reporting requirements to Schedule II users in fact was consonant with the legislative goals.

The plaintiffs also contend that the statute, by imposing stricter confidentiality requirements to an addict's records[7] than it does to the records of a Schedule II drug user,[8] is

---

[7] "§ 3356 Central registry confidentiality.

1. The department shall establish a central registry as part of which the following information shall be assembled:

(a) the name and other identifying data relating to each reported addict;

(b) the status of each addict awaiting admission to an approved program or programs;

(c) the status of each addict in an approved program.

2. Identifying data in such registry with respect to an individual addict shall be available only to a practitioner attempting to ascertain the status of an addict seeking treatment with him or admission to a program with which he is associated."

[8] "§ 3371 Confidentiality of certain records, reports, and information.

1. No person, who has knowledge by virtue of his office of the identity of a particular patient or research subject, a

(*footnote continued on following page*)

irrational and unconstitutional. The Controlled Substances Act deals at some length with distributions of drugs to addicts, Title V, §§ 3350-3356, and attempts to make provision for the effective treatment and rehabilitation of addicts in "maintenance programs." It is well known that addicts have generally been quite reluctant to participate in drug programs. One can well assume that active police surveillance of these programs would generate additional hostility among the addict population. The legislature, recognizing that addicts would be particularly reluctant to join treatment programs if their records were available to the police, imposed especially rigid confidentiality standards for addicts' files. It is evident, therefore, that § 3356 rationally promotes a valid and legitimate state interest and that the differing treatment afforded Schedule II users and addicts does no violence to any strictures imposed by the equal protection clause.

The only remaining question is whether the system devised does in fact further the objectives of the statute. The

---

(*footnote continued from preceding page*)

manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:

(a) to another person who by virtue of his office is entitled to obtain such information; or

(b) pursuant to judicial subpoena or court order in a criminal investigation or proceeding; or

(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by this article to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board.

2. In the course of any proceeding where such information is disclosed, except when necessary to effectuate the right of a party to the proceeding, the court or presiding officer shall take such action as is necessary to insure that such information, or record or report of such information is not made public."

conclusion that it does seems unavoidable. Through the use of this system the state will more effectively be able to investigate and control such drug related abuses as forgeries, prescriptions to fictitious persons, patients receiving dangerous drugs from a number of different doctors, and similar activity. Based upon the evidence presented to me, especially the affidavit of Dr. Robert Whalen, Second Deputy Commissioner of the New York State Department of Health and the Interim Report of the Temporary State Commission to Evaluate the Drug Laws, I can only conclude that the system of reporting required by the statute directly and substantially effectuates the state's legitimate interests as expressed by the Act.

The right to privacy, to which I now direct my attention, is more difficult primarily because the issue has only recently clearly emerged as a basic constitutional consideration. It is not necessary here to expound upon the historical antecedents and the current flowering of that right. We are all aware of course that Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) solidified privacy's constitutional status and that since that decision numerous extensions of its essence have occurred. See, *e. g.*, United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) and, to some extent, the recent decisions of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).

The case at bar, however, is significantly distinguishable from each of those cases and from any case cited to the court by counsel. The fundamental thrust of this lawsuit might be made clearer by briefly discussing what is *not* involved here.

First, this is not a case where the state has launched a broad scale invasion into the doctor-patient relationship re-

quiring the publication of the entire medical history and treatment record. Indeed, contrary to plaintiffs' suggestion, even the illness for which a Schedule II drug is prescribed need not be revealed.

Second, the statute *on its face* does not permit unrestricted divulgence of even the limited information collected. In fact § 3371 confines disclosure to the extent consistent with the purposes of the Act. I have also been presented with the memorandum of Assemblyman Hardt and the affidavit of Commissioner Whalen, both of whom appear to be taking all necessary steps to maintain the security of the computerized information.

Finally, this is not a case where the plaintiffs have been able to prove actual abuse of the reporting and computerizing process and consequently to argue facial unconstitutionality based upon pragmatic or historical evidence; that is that such process necessarily and inevitably results in abuse.

In order to further appreciate the essence of plaintiffs' privacy argument, it is necessary to consider the status of the law prior to April 1, 1973. Insofar as the issues involved in this lawsuit are concerned, the only effective distinction is that the new statute requires sending a copy of each prescription for Schedule II drugs to Albany to be computerized. Previously prescriptions required the name of the patient, N.Y. Public Health Law § 3301(32) (McKinney 1971) (repealed 1973), the pharmacist was required to keep a copy of the prescription, *Id.* at § 3322, and law enforcement officials had complete access to the druggists prescription files, *Id.* at §§ 3322(1)(c), 3334. In short, the state had the power to learn all that it may now require to be revealed. The only difference is that now the state has developed the means to make effective use of that basic power which remains unchallenged.

Opinion Denying Plaintiff's Motion for an Order Convening a Three-Judge Court, etc.

I must confess, however, that plaintiffs' claims fall upon sympathetic ears. I share with the plaintiffs a deep concern about the ultimate consequences of overzealous data collection and instant data retrieval. I recognize the dangers in a society which permits the government to know the intimacies of its citizens' lives and especially the consequences to those people against whom such information is maliciously or malevolently used. And I realize the potential for individual harm consequent upon errors of fact becoming imprinted upon unforgiving tapes.

Yet computers, computer banks—the new technology—are facts of present day life. Courts can be no more effective than Canute in turning back the tide. It cannot be contended, at least not seriously, that governmental use of this new technology is constitutionally impermissible. And that is the fundamental and basic question which is being raised.

It may well be that courts will be required to establish guidelines and set standards but that is not this case. I do not believe that the United States Constitution proscribes state use of computer lists which contain the names of patients as is provided for under this statute.

The motions for preliminary and permanent injunctions are denied and the temporary restraining order is dissolved. The complaints are dismissed for want of a substantial federal question.

So ordered.

Opinion of United States Court of Appeals.

RICHARD ROE, an infant, by Robert Roe, his parent et al., Plaintiffs-Appellants,
George Patient et al., Intervenors-Appellants,

v.

Hollis S. INGRAHAM, as Commissioner of Health of the State of New York, Defendant-Appellee.

Nos. 947, 948, Dockets 73-1562, 73-1582.

United States Court of Appeals, Second Circuit.

Argued May 4, 1973.

Decided May 24, 1973.

Before FRIENDLY, Chief Judge, HAYS, Circuit Judge, and JAMESON,* District Judge.

FRIENDLY, Chief Judge:

This appeal from an order of the District Court for the Southern District of New York, 357 F.Supp. 1217 dismissing complaints in actions under the civil rights statute, 42 U.S.C. § 1983, as jurisdictionally implemented by 28 U.S.C. § 1343(3), relates to the New York State Controlled Substances Act, N.Y.Laws 1972, ch. 878, amending N.Y. Public Health Law §§ 3300-96, effective April 1, 1973, McKinney's Consol.Laws, c. 45.

The Controlled Substances Act represents a comprehensive effort by the State, aimed primarily at controlling the

---

* Of the United States District Court for the District of Montana, sitting by designation.

abuse caused by diversion of lawfully manufactured and prescribed dangerous drugs into unlawful uses. Broadly speaking, the scheme of the statute is to classify each such drug in one of five schedules, see Public Health Law § 3306, depending on the degree of harm its abuse may cause and the extent of its lawful medical uses, with restrictions imposed on distribution of the drug varying in accordance with the schedule in which it is placed. Schedule I lists drugs with a high potential for abuse, for which there is no generally recognized medical use, including certain opiates and opium derivatives, various hallucinogenic substances, and marijuana; § 3330 forbids prescribing any such substance except for strictly limited purposes detailed in Title III. Schedule II lists substances having a high potential for abuse leading to severe psychological or physical dependence, but having accepted medical use in some cases; included in this schedule are such major narcotics as cocaine, concentrated codeine, morphine, Demerol, and other opiates, and the amphetamines. Schedule II drugs may be prescribed and dispensed only in the manner hereafter described. Schedules III, IV and V list other drugs of medical utility having progressively less severe effects on the central nervous system; these may be prescribed and dispensed in less onerous ways unnecessary here to detail.

Plaintiffs' complaints are particularly directed at the procedure established for the prescription of Schedule II drugs. Section 3338(2) directs that, except for emergency oral prescriptions,[1] substances listed in Schedule II may be dispensed only upon an official New York State prescription form. These forms, to be prepared and issued

[1] The procedure for these, detailed in § 3334, ultimately results in the same filing with the Department of Health of a copy of the prescription bearing the name of the patient about which plaintiffs complain.

by the Department of Health in groups of 100, are to be in triplicate and serially numbered, § 3338(1). So far as here relevant, the prescription must contain the name, address and age of the patient; the name, address, registration number, telephone number and handwritten signature of the prescribing practitioner; specific directions for use; and the date upon which the prescription was actually signed, § 3332(2). When the practitioner also dispenses, he must retain the original for five years and file the two copies with the Department of Health not later than the fifteenth day of the month following that in which the substance was delivered, § 3331(6). When dispensing is to be done by a pharmacist, the practitioner must retain a copy for five years, § 3332(4), the pharmacist must retain the original for a like period, and the pharmacist must file a copy endorsed with the date of delivery, the registration number of the pharmacy, and his signature, with the Department of Health not later than the fifteenth day of the month following that in which the substance was delivered, § 3333. The information contained in the prescriptions filed with the Department of Health is afforded some degree of confidentiality by § 3371, which provides:

> 1. No person, who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:
>
> (a) to another person who by virtue of his office is entitled to obtain such information; or
>
> (b) pursuant to judicial subpoena or court order in a criminal investigation or proceeding; or
>
> (c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by this

article to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board.

2. In the course of any proceeding where such information is disclosed, except when necessary to effectuate the rights of a party to the proceeding, the court or presiding officer shall take such action as is necessary to insure that such information, or record or report of such information is not made public.

This action against the Commissioner of Health was brought by three infants reeciving prescriptions for medications listed under Schedule II, two physicians who prescribe drugs listed under that schedule, and the Empire State Physicians Guild, Inc. A post-operative cancer patient who receives Hycodan and Percodan, both Schedule II drugs, a woman suffering from migraine who receives Demerol, a physician who prescribes for one of these patients, and the American Federation of Physicians and Dentists were permitted to intervene as plaintiffs and also to file a separate complaint. Alleging that the compelled disclosure to the Department of Health of the identity of patients for whom Schedule II drugs have been prescribed unconstitutionally invades the patient's right to privacy, infringes on the doctor's right to prescribe treatment solely on the basis of medical considerations, and discriminates against persons suffering from certain diseases by requiring their identification to a governmental agency as a condition to receiving medical treatment, plaintiffs sought temporary and permanent injunctive relief and asked that a three-judge court be convened, 28 U.S.C. § 2281, to consider their complaint. An affidavit supporting the application for a temporary restraining order annexed a Memorandum to members of the New York Legislature from the Chairman of the Temporary State

Commission to Evaluate the Drug Laws, which had proposed the New York State Controlled Substances Act. This Memorandum was submitted because, in addition to elaborating the reasons thought to require the strict control of Schedule II substances, it demonstrated that information from the official prescription would be coded into a computer. The report explained that the computer would be asked certain questions at regular intervals. These questions, which "will be formulated at the highest administrative level," would relate to physicians who had "prescribed and dispensed a greater amount of a Schedule II substance than could possibly be justified by the nature of their practice" and to "situations arising from lost or stolen prescriptions." The Memorandum stated, however, that the proposed plan would not "make use of massive print-outs of patients' names," or, indeed, disclose identifying data about any patient "unless, based upon previous reports, it is clear that such patient has been using stolen or forged prescriptions."[2]

The district court issued a temporary restraining order against the Commissioner's accepting for filing or processing forms containing the identity of patients receiving prescriptions for Schedule II drugs or requiring physicians or pharmacists to file such forms, and directing the Commissioner to maintain in a sealed vault such forms as were received. It also set an early hearing on the motion to convene a three-judge court. The State responded with a

[2] The motion for a temporary injunction was also supported by affidavits of parents of the infant plaintiffs, objecting to the names of their children and the medications they are receiving being disclosed to the state and recorded in the state's data bank, and affidavits of physicians asserting that the disclosure requirement would make them reluctant to prescribe, and patients reluctant to accept, Schedule II drugs, thus causing non-medical considerations to interfere with the doctors' determination as to the appropriate medical treatment.

motion to dismiss the complaint. It submitted an affidavit of Dr. Robert Whalen, Second Deputy Commissioner of the Department of Health. This developed the reasons, discussed below, which were thought to require the filing of the prescriptions with the patients' names on them. Dr. Whalen alleged that similar multiple prescription procedures had been in effect in three other states, for considerable periods, with beneficial effects. He also said that the exception in § 3371(1)(a) allowing disclosure "to another person who by virtue of his office is entitled to obtain such information" was "to allow disclosure internally within the Department to those with a controlled substance responsibility." Annexed to his affidavit were a manual of the State Commissioner of Health entitled "Security of Computer Systems," another manual of the State Commissioner of Health dealing generally with confidential information, and a policy statement dealing specifically with security from unauthorized disclosure of information obtained by the Department of Health under the Controlled Substances Act. Relying in part on this affidavit, which the district judge took to demonstrate that the Department of Health was "taking all necessary steps to maintain the security of the computerized information," he found no substantial constitutional question and dismissed the complaint for lack of federal jurisdiction. He continued the temporary restraining order for three days to allow plaintiffs to seek a further stay from this court after filing notice of appeal, and another panel of this court continued so much of it as required the Commissioner to retain prescriptions received in a sealed vault pending an expedited appeal.[3]

[3] It is clear that the modified restraining order does not relieve physicians and pharmacists from performing the duties imposed on them by the statute under attack. The Commissioner is at liberty to announce this if he deems it desirable.

In the face of recent strong advocacy of the abolition of the three-judge court requirement in constitutional cases,[4] a unanimous Supreme Court has just defined the standard permitting a single judge to dismiss a complaint seeking an injunction on the ground of unconstitutionality in the most limiting terms the Court has ever used. In Goosby v. Osser, 409 U.S. 512, 516, 93 S.Ct. 854, 858, 35 L.Ed.2d 36 (1973) it said:

> Section 28 U.S.C. § 2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious" Bailey v. Patterson, 369 U.S. 31, 33, 82 S.Ct. 549, 551, 7 L.Ed.2d 512 (1962), "wholly insubstantial," *ibid,* "obviously frivolous," Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910), "obviously without merit," Ex parte Poresky, 290 U.S. 30, 32, 54 S.Ct. 3, 4-5, 78 L.Ed. 152 (1933). The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if "its unsoundness so clearly results

[4] See Report of the Study Group on the Caseload of the Supreme Court 28-30 (1972); 1970 Report of the Proceedings of the Judicial Conference of the United States, at 78-79; Burger, The State of the Federal Judiciary—1972, 58 A.B.A.J. 1049, 1053 (1972).

from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Ex parte Poresky, *supra,* 290 U.S. at 32, 54 S.Ct., at 4; see also Levering and Garrigues Co. v. Morrin, *supra,* 289 U.S. 103, 105, 53 S.Ct. 549, 550, 77 L.Ed. 1062 (1933); Hannis Distilling Co. v. Baltimore, *supra,* 216 U.S. at 288, 30 S.Ct. at 327; McGilvra v. Ross, 215 U.S. 70, 80, 30 S.Ct. 27, 31, 54 L.Ed. 95 (1909).

Despite the severity of this standard, we should have little difficulty in sustaining the district court if plaintiffs' attack had been limited to the discrimination between the disclosure requirements applicable to prescriptions for drugs in Schedule II and those applicable to drugs in Schedules III, IV and V. It is apparent that the limitation of the central filing requirement to Schedule II drugs was designed for the specific purpose of confining the resulting intrusion into privacy to those drugs whose unlawful distribution entails the greatest danger to patients and the public. The legislative purpose in making the differentiation being thus permissible, indeed, laudable, the courts will not assume the task, for which they are conspicuously unfitted, of inquiring whether every drug was properly placed by the Legislature in one schedule rather than another. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 57 L.Ed. 730 (1913). The district court likewise was clearly correct in dismissing the plaintiffs' claim that the Act's imposition of stricter confidentiality requirements upon the records of addicts participating in drug maintenance programs than on the information relating to Schedule II drug prescriptions denied them equal protection of

the laws. As the district judge pointed out addicts have understandably been reluctant to bring their drug use to the light of day, and the state could reasonably have believed that only the strictest confidentiality, including protection from disclosure to law enforcement authorities, would encourage them to join treatment programs.

This, however, was only a part, indeed a relatively minor part, of plaintiffs' complaints. The patients' main attack is that the requirement of filing with the Department of Health is an impermissible invasion of a constitutional right to privacy with respect to the status of their health and the medical treatment they are receiving, and the physicians contend that the danger of disclosure impairs a constitutional right to make their decisions solely on the basis of medical considerations.[5]

The concept that privacy may be a constitutional right enjoying protection against governmental intrusions other than those banned by specific provisions of the Bill of Rights, notably the First and Fourth Amendments, see Stanley v. Georgia, 394 U.S. 557, 564-566, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); Katz v. United States, 389 U.S. 347, 351-353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), was first explicitly stated in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).[6] That decision, along with Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), can be viewed as forecasting recogni-

---

[5] The standing of the physicians seems to be established by Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed. 2d (1965), and Doe v. Bolton, 410 U.S. 179, 185, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). However, since their claims are less impressive than those of the patients, we will confine our discussion of the merits to the latter.

[6] There are passages in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 536, 541 (majority opinion of Douglas, J.), 546-547, 62 S.Ct. 1110, 86 L.Ed. 1655 (concurring opinion of Jackson, J.) (1942), which may be regarded as harbingers.

tion of a constitutional right of men and women to decide, free of governmental interference, whether to minimize the risks of conception from sexual intercourse, although *Griswold* focused on the provision of the Connecticut statute proscribing the *use* of contraceptives and the attendant horrors of enforcement in the case of married persons, 381 U.S. at 485-486, 85 S.Ct. 1678, and *Eisenstadt* was rested on the equal protection clause. Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), went further and held that a woman's right to terminate her pregnancy was a "fundamental" constitutional right, subject to regulation only on the basis of a "compelling" state interest, which was found not to exist during the first trimester and to exist only in a limited degree in the second. Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), took a still further step by recognizing a pregnant woman's constitutional right to make the abortion decision on the basis of advice from her own physician without the approval of a hospital committee or the concurrence of other doctors.

Although, as we recently indicated in Rosenberg v. Martin, 478 F.2d 520, at 524 (2 Cir. 1973), the right to privacy which thus far has been granted constitutional protection relates only to "the most intimate phases of personal life," having to do with sexual intercourse and its possible consequences, it is not "obvious" that the right will be thus confined. Indeed, the Court's recognition in Roe v. Wade, *supra,* 410 U.S. at 153, 93 S.Ct. at 727, that the right to privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" itself suggests that the right may not be so closely cabined. See, for an adverse criticism, Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973). As Mr. Justice Stewart stated in his concurrence in *Roe,* 410 U.S. at 169, 93 S.Ct. at 735, quoting Mr. Justice Harlan's dissenting opinion in Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), the

liberty guaranteed by the due process clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."

If there is anything "obvious" about the constitutional right to privacy at the present time, it is that its limits remain to be worked out in future cases. Should the constitutionally protected zone of privacy be extended beyond the area already recognized, the individual's interest in keeping to himself the existence of his physical ailments[7] and his doctor's prescriptions for them would lie rather close in the continuum.[8] If New York had passed a statute directing that all prescriptions, or even all prescriptions for Schedule II drugs, must be published in the press, we do not think the State would have seriously contended, still less that the district judge would have held, that a constitutional attack was "obviously frivolous." That is enough to show that the quetsion whether the right of privacy here asserted by the patients does enjoy some degree of constitutional protection is a substantial one. As-

---

[7] While the State correctly points out that the prescription form does not require a description of the illness, plaintiffs counter that, at least for some of the drugs in Schedule II, many members of the public know the ailments for which such drugs are commonly prescribed. To take perhaps the most obvious examples, most informed people would associate large dosages of Demerol with an ailment causing serious pain. It is immaterial that the ailment usually is not one that should arouse any emotion toward the victim save sympathy; most people simply do not want their ailments to be generally known.

[8] Indeed, there is language in Doe v. Bolton, *supra,* 410 U.S. at 194, 93 S.Ct. 739, from which it could be argued that the Court has already taken the step of extending constitutional protection to the privacy of the doctor-patient relationship.

suming that such a constitutionally protected right does exist, the plaintiffs have raised a further question whether the impairment of that right was justified by some larger interest which the State is entitled to pursue.

The right to privacy in matters such as those here at issue surely is not absolute. This is shown by the rulings in Roe v. Wade, *supra,* 410 U.S. at 152, 93 S.Ct. 705, permitting restrictions on the abortion decision during the second trimester of pregnancy and prohibition of it during the third. Also, we do not read the portion of Doe v. Bolton, *supra,* 410 U.S. at 198, 93 S.Ct. 739, striking down Georgia's "two doctor concurrence" requirement as meaning that a state is wholly without power to regulate the practice of medicine or the activities of physicians except by professional censure, deprivation of licenses, or enforcement of the criminal law. Indeed, plaintiffs seem to concede that their constitutional rights were not violated by the previous New York laws, which required prescriptions for narcotic drugs to bear the full name and address of the patient, and the name, address, registration number and signature of the physician, former Public Health Law § 3301(32) (McKinney 1971); required pharmacists to retain copies of prescriptions for two years, former Public Health Law § 3322(1)(c); and allowed inspection of them by state and federal law enforcement authorities as well as the Department of Health, former §§ 3322(1)(c), 3334(1).

New York has advanced powerful arguments in support of the requirement of central filing of prescriptions for Schedule II drugs. The most important are that only by such filing, now complemented by the computer's ability to answer appropriate inquiries, can the State readily detect a number of serious abuses—the same patient going from doctor to doctor and thereby obtaining quantities of Schedule II drugs greater than his legitimate medical needs; over-prescription by doctors; and the theft or

forgery of prescriptions. Each of these abuses leads to an individual's possession of quantities of these dangerous drugs which would be seriously harmful if used and afford the opportunity for sale into illicit drug channels. Without questioning the seriousness of the problem, plaintiffs respond that these abuses could be adequately controlled without central filing, or by central filing without patient's names, and that the added efficiency is not worth the price in terms of risk of disclosure.

On this last point something turns on how great the risk is. While the Constitution does not condemn a state to using ineffective means in dealing with a problem as serious as the use of the opiates and stimulants listed in Schedule II, it may well condition use of a more effective means which involves a danger to constitutionally-protected privacy on the taking of all reasonable precautions to limit the risk. The complaints, and other material of which we may take judicial notice, are not conclusive on this score. Although Dr. Whalen may be correct in asserting that § 3371(1)(a) was intended only to allow disclosure of prescription information to Department of Health officials working in the area, the statutory language is so open-ended that full exploration of how confidentiality is in fact being preserved may be required. If it were clear that the State had taken or proposed to take effective steps, by regulation or otherwise, to limit access to the patients' names on the prescription forms as rigidly as is consistent with accomplishment of the asserted statutory purpose, the grounds for constitutional attack might disappear. But the district court was not entitled to dismiss the complaint on the basis of the State's assertions that it has already done this. The Supreme Court stated long ago in Ex parte Poresky, 290 U.S. 30, 32, 54 S.Ct. 3, 4, 78 L.Ed. 152 (1933), that "The existence of a substantial question of constitu-

tionality must be determined by the allegations of the bill of complaint." See also Goosby v. Osser, *supra,* 409 U.S. at 521, 93 S.Ct. 860 n. 7. Looking at these allegations, and also at the Memorandum of the Temporary State Commission to Evaluate the Drug Laws which was annexed to the moving affidavit of plaintiffs' counsel, and the various state manuals, as we think we may, we do not believe that, under the strict test announced in Goosby v. Osser, *supra,* the complaint could properly have been dismissed without further exploration of the degree of need for central filing including the patients' names on the one hand, and the adequacy of the provisions to protect against malicious or careless disclosure on the other.

The order of dismissal is therefore reversed, with instructions to the district judge to request the convening of a three-judge court under 28 U.S.C. §§ 2281 and 2284. The temporary restraining order, as modified by this court, is continued pending the hearing before such a court and for such further period, if any, as that court may then direct.

Notice of Motion to Dismiss Complaint.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of A. Seth Greenwald, sworn to June 18, 1973, the various summons and complaints, the prior affidavit of Robert P. Whalen, M.D., sworn to April 3, 1973, the proposed regulation on confidentiality, and all the prior submissions and proceedings, the undersigned will move this Court on

June 25, 1973 at 4:30 P.M., in Room , United States Courthouse, Foley Square, New York, New York, for an order pursuant to the Federal Rules of Civil Procedures, Rules 12(b)(6) dismissing the complaints upon the ground that they fail to state a claim upon which relief may be granted, and that they are moot by virtue of the promulgation of the amended regulation 10 NYCRR § 80.107, suspension of any inspection pending determination of this motion, and for such other and further relief as may be just and proper.

Dated: New York, New York
June 18, 1973

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
By

.....
A. SETH GREENWALD
Assistant Attorney General

To: SHEA, GOULD, CLIMENKO
& KRAMER, Esqs.

NORWICK, RAGGIO & JAFFE, Esqs.

Affidavit of A. Seth Greenwald, in Support of Motion.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

A. SETH GREENWALD, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant.

I have already made objection to plaintiffs' use of fictitious names in this action in my affidavit of April 4, 1973 and reiterate that plaintiffs should be required to disclose their actual identities with any protections the Court considers necessary.

As to any preliminary injunction it should not extend beyond the actual plaintiffs as this is not a class action. In any event no modification of the order of the Court of Appeals is warranted since it is unnecessary.

As to the motion to dismiss, it would appear that there are no issues beyond those presented by the complaint and opposing papers. The defendant has established thorough security it proposes to use with the triplicate prescriptions when the system is implemented, if permitted by this Court. Together with the new regulation, it is submitted that only issues of law are presented by this case and the questions raised by the Court of Appeals are essentially moot.

WHEREFORE, your deponent respectfully requests that the complaint be dismissed.

(Sworn to by A. Seth Greenwald, June 18, 1973.)

Opinion of Three-Judge Court Denying Plaintiffs' and Defendant's Motion.

(36 F. Supp. 536)

Richard ROE, an infant, by Robert Roe, his parent, et al., Plaintiffs,

and

George Patient et al., Intervenors,

v.

Hollis S. INGRAHAM, as Commissioner of Health of the State of New York, Defendant.

No. 73 Civ. 1303.

United States District Court, S. D. New York.

Aug. 23, 1973.

OPINION

ROBERT L. CARTER, District Judge.

I

Statute Under Attack:

This action challenges the constitutionality of certain provisions of the New York State Controlled Substances Act (the "Act"), New York Laws 1972, ch. 878, N.Y. Public Health Law § 3300 et seq. (McKinney's Consol. Laws, c. 45, Supp. 1972) effective April 1, 1973, as amended, New York Laws 1973, ch. 97, ch. 163, ch. 728. The Act attempts a comprehensive regulation of all facets of the legitimate drug trade—research, manufacture, medical prescription, wholesale and pharmaceutical distribution—in an effort to prevent and discover any diversion of this trade to illegitimate use.

The provisions of the Act apply to "controlled substances"—those drugs warranting regulation—which are described in detail in § 3306. Furthermore, that section classifies the regulated drugs into "schedules" depending upon the extent to which the drugs may be lawfully prescribed for medical purposes and the dangers inherent in their misuse. Thus, Schedule I drugs "are all highly abusable substances which have no current medical use or lack accepted safety for use in treatment under medical supervision in this country." Interim Report of the Temporary State Commission to Evaluate the Drug Laws ("Interim Report") at 13.[1] These drugs may not be prescribed, distributed or possessed for any purpose other than the strictly limited use described in Title III, §§ 3324-3329, pertaining to research and related activities, § 3330.

Schedule II contains "those substances which have a high potential for abuse, but also have an accepted or restricted medical use. Abuse of a Schedule II substance may lead to severe physiological dependence." Interim Report at 13. Schedules III, IV and V list those drugs having an accepted medical use but a potential, though in decreasing degree, for psychological and/or physiological dependence consequent to misuse.

The Act requires that an official New York State prescription form[2] be used to prescribe or dispense Schedule

[1] The Temporary State Commission to Evaluate the Drug Laws was created in 1970 to investigate the problems arising under existing drug laws and to recommend changes in the law. New York Laws 1970, ch. 474, as amended by New York Laws 1971, ch. 7. The Committee's recommendations as contained in the Interim Report were adopted by the legislature virtually without modification.

[2] These forms are to be prepared and issued by the Department of Health, numbered serially, prepared in triplicate and issued to practitioners in groups of one hundred at a cost of $10 per group (10¢ per triplicate form), § 3338.

II drugs, § 3338(2)[3], except in cases of emergencies § 3334. This triplicate form must contain the following information: the name, address and age of the patient; the name, address, registration number, telephone number and handwritten signature of the physician, directions for use (*e. g.*, dosage, frequency of dosage and maximum daily use), and date the prescription was signed, § 3332.

In the event the drug is actually administered or dispensed by the prescribing physician, the doctor must retain a copy of the form in his files for a period of five years and file the original and one copy with the Department by the fifteenth day of the month following the month in which the drug was dispensed, § 3331(6). If, however, the prescription is to be dispensed by a pharmacist, the doctor shall keep one copy of the form in his files for a period of five years and deliver to the patient the original and one copy, § 3332(4). The drug user will deliver those two forms to the pharmacist who, upon filing the prescription, shall endorse the original and copy with the date of delivery, the pharmacist's registration number and his signature, § 3333(3). The original of the form will be retained by the pharmacist for five years and the copy must be filed with the Department of Health by the fifteenth day of the month following the month in which in which the drug was dispensed, § 3333(4).

The confidentiality of the records collected pursuant to the above procedures is protected as provided for in the statute, § 3371. That section states:

> 1. No person, who has knowledge by virtue of his office of the identity of a particular patient or research

[3] The statute authorizes the Commissioner of Health to require any particular Schedule III or IV drug to be prescribed or dispensed only upon an official prescription form, § 3338 (3), but the court has no knowledge that such discretionary power has been exercised or that notice of an intention to do has been given and issues concerning these schedules are not before us.

subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:

(a) to another person who by virtue of his office is entitled to obtain such information; or

(b) pursuant to judicial subpoena or court order in a criminal investigation or proceeding; or

(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by this article to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board; or

(d) to a central registry established pursuant to this article.[4]

---

[4] The statute requires that addict maintenance programs be approved by the Commissioner, § 3352, pursuant to specific statutory standards, § 3353. Such programs are required to maintain certain records pertaining to addicts who are either in or have applied for admission to the program, § 3354 and the program must file monthly reports with the Department summarizing its activity in the preceding month, § 3355. The Department is required to maintain a "central registry" which, by drawing from the reports submitted pursuant to § 3355 and § 3372 (requiring individual physicians to report the name and other identifying information of any person found to be an addict), will be a centralized repository of information pertaining to the status of addicts and applicants for admission to maintenance programs, § 3356. That section provides:

1. The department shall establish or cause to be established a central registry as part of which the following information shall be assembled:

(a) the name and other identifying data relating to each reported addict;

(*footnote continued on following page*)

2. In the course of any proceeding where such information is disclosed, except when necessary to effectuate the rights of a party to the proceeding, the court or presiding officer shall take such action as is necessary to insure that such information, or record or report of such information is not made public.

Pursuant to its statutory authority, the Department of Health has promulgated regulations in respect of confidentiality as follows:

No person who by virtue of his office has knowledge of any records required by article 33 of the Public Health Law or this Part shall disclose such knowledge, or any report or record thereof, except:

(a) to another person who by virtue of his office is entitled to obtain such information;

(b) pursuant to judicial subpoena or court order in a criminal investigation or proceedings; or

(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by this

---

(*footnote continued from preceding page*)

(b) the status of each addict awaiting admission to an approved program or programs;

(c) the status of each addict in an approved program.

2. Identifying data in such registry with respect to an individual addict shall be available only to:

(a) a practitioner attempting to ascertain the status of an addict seeking treatment with him or admission to a program with which he is associated;

(b) an agency, department of government, or commission established pursuant to the mental hygiene law and authorized to gather such information.

> article to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board. 10 N.Y.C.R.R. § 80.107[5]

The Issue to be Decided:

Although the Act does not specifically so provide, it is alleged by plaintiffs and conceded by the state, that the Department of Health will, upon receipt of the prescription forms, enter the information received into a computer. This anticipated procedure is the focus of plaintiffs' complaint.

---

[5] The Attorney General has informed the court that in response to the Court of Appeals decision in this case, discussed below, these regulations were amended to read as follows:

> No person who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:
>
> (a) to another person who by virtue of his office as an employee of the department is entitled to obtain such information; or
>
> • • • • •
>
> (d) to a central registry established pursuant to this article.

The Act authorizes the Commissioner of Health to promulgate regulations thereunder provided that a 21-day period is allowed for public response, § 3308. Furthermore, New York law requires that a copy of any proposed regulation must be admitted to the legislature at least 21 days before its adoption. N.Y. Executive Law § 101-a (McKinney's Consol.Laws, c. 18, 1972). Immediately after adoption by the Department the regulation must be sent to the Secretary of State for inclusion in the official compilation of rules and regulations. N.Y. Executive Law § 102 (McKinney 1972). We have been advised that the new confidentiality regulation was submitted to the legislature in early June, 1973, and was formally promulgated by the Department of Health on July 2, 1973, effective upon filing with the Department of State.

The original plaintiffs in this action include three infants (by their parents) and one adult receiving Schedule II drugs, two named doctors who prescribe such drugs, and the Empire State Physicians Guild, Inc.[6] The plaintiffs complain of a violation of their constitutionally protected rights, 42 U.S.C. § 1983 and assert that the jurisdiction of the court is founded upon 28 U.S.C. § 1343(3). They allege that the reporting provisions of the Act

> by requiring disclosure of the identity of certain patients . . . invades the patient's right of privacy and confidentiality, infringes on the doctor's right to prescribe treatment for his patients solely on the basis of medical consideration and discriminates against persons suffering from certain diseases by requiring their identification to a governmental agency as a condition to receiving medical treatment for their illness. Complaint, Para. 11.

Shortly after the commencement of the action a post-operative cancer patient and an individual suffering from migraine headaches, both of whom receive Schedule II drugs as medication, the physician prescribing such drugs for one of these patients, and the American Federation of

---

[6] The physicians are not here merely asserting the rights of their patients but claim independent violation of protected constitutional rights. Their standing to sue is established by Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 95 L.Ed.2d 201 (1973). See also, Roe v. Ingraham, 480 F.2d 102, (2d Cir. 1973) at n. 5. Although it is unclear from the complaint, the Physicians Guild is apparently suing on behalf of its doctor members. Inasmuch as its claims are only repetitive, we may assume proper standing exists. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

Physicians intervened and filed a separate complaint.[7] The intervenor plaintiffs repeat verbatim the language of the original complaint (quoted above) alleging that the Act is constitutionally infirm. In addition, the intervenors claim that the Act

> on its face, conflicts with, is inconsistent with and overlaps federal law and federal regulation and is thus void, being in conflict with the commerce power of the United States government and the laws and regulations enacted by the United States pursuant thereto. Complaint, Para. 13.

Both complaints, in identical laguage, ask for preliminary and permanent injunctive relief and the determination of these issues by a three-judge court pursuant to 28 U.S.C. § 2281.

---

[7] All of the patient-plaintiffs—the three children and adult of the original complaint and the intervenor cancer patient and migraine sufferer—are identified in each complaint only by fictitious names ostensibly to protect their identities. This procedure is not explicitly authorized by the federal rules. However, it was given implicit recognition by the United States Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). The inherent problems which this procedure poses, most notably the possible inability to fix *res judicata* effect, mandate that it be used sparingly. Here, however, if plaintiffs are required to reveal their identity prior to the adjudication on the merits of their privacy claim, they will already have sustained the injury which by this litigation they seek to avoid. See N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Under such circumstances it is permissible to proceed by pseudonym but only if these fictitious names are actually representative of real and specific aggrieved individuals. Plaintiffs' attorneys have represented to the court that these preconditions have been met.

Prior Court Proceedings:

By Order to Show Cause filed on March 29, 1973, the same date as the filing of the complaint, plaintiffs requested a temporary restraining order enjoining the implementation of the Act which was to become effective on April 1, 1973.

The District Court, after hearing all counsel in chambers, and based upon a number of supporting affidavits and their exhibits, issued a temporary restraining order enjoining the defendant from filing or processing any prescription forms containing a patient's name, from requiring physicians or pharmacists to file such prescription forms with the Department, and requiring placing under seal any form received until dissolution of the order.[8]

On April 6, 1973, the district court heard oral argument on plaintiffs' motion to convene a three-judge court and defendant's motion, made on April 3, 1973, to dismiss the action. The court, D.C., 357 F.Supp. 1217, dismissed for lack

---

[8] The order provided that it be:

> ORDERED, that, pursuant to 28 U.S.C. Section 2284(3) and Fed.R.Civ.P.R. 65, pending determination of plaintiffs' application for a preliminary injunction, defendant Hollis S. Ingraham, his agents, servants and employees, be and they hereby are restrained from
>
> (a) accepting for filing or processing New York State prescription forms containing the identity of patients receiving prescriptions for Schedule II controlled substances as set forth in Section 3306 of Article 33 of the Act; and
>
> (b) requiring physicians or pharmacists to file prescription forms containing the identity of patients receiving prescriptions for Schedule II controlled substances as set forth in Section 3306 of Article 33 of the Act; and
>
> it is further ORDERED that defendant, his agents, servants and employees shall retain in a sealed vault or other equally secure place any prescription forms received by them during the pendency of this temporary restraining order.

of a substantial federal question both in respect of the claim of denial of equal protection and infringement of plaintiffs' right of privacy.[9]

The Court of Appeals reversed the order of dismissal. Roe v. Ingraham, 480 F.2d 102 (2d Cir. 1973). While agreeing that plaintiffs' equal protection claims were properly dismissed, the court concluded that "the question whether the right of privacy here asserted by the patients does enjoy some degree of constitutional protection is a substantial one." *Id.* at 108. Assuming that right extended to the circumstances of this case, the district court would be required to determine whether its invasion was justified. Such a determination would require a factual investigation of the "need for central filing including the patients' names on the one hand and the adequacy of the provisions to protect against malicious or careless disclosure on the other." *Id.* at 109. For these reasons the Court of Appeals directed the district judge to request the convening of a three-judge court to make such a determination.

In stating that the plaintiffs' claim was "substantial" the Court of Appeals used that word as applied to the power of a single judge to dismiss a complaint seeking an injunction against an allegedly unconstitutional state law. Its decision means only that the complaints are "substantial" in that they are not "essentially fictitious", "wholly insubstantial", "obviously frivolous". Goosby v. Osser, 409 U.S. 512, 516, 93 S.Ct. 854, 858, 35 L.Ed.2d 36

---

[9] The trial court continued the temporary restraining order for three days to permit plaintiffs an opportunity to seek a further stay from the Court of Appeals. That court continued the order only insofar as it required the Commissioner to seal the prescription forms he receives pending appeal. Thus, doctors and pharmacists were required to perform all of their obligations under the Act. This modified order was continued by the three-judge court and remains in effect at this time.

(1973) (citations omitted). Whether the complaints are sufficiently substantial to defeat a motion to dismiss and whether plaintiffs are entitled to a preliminary injunction upon the determination of a statutory court of three judges, are wholly different problems.

II

Hearing Before This Court:

On remand, this statutory court was convened, as provided by 28 U.S.C. § 2281, and on June 25, 1973 heard oral argument on the plaintiffs' motion for a preliminary injunction and defendant's motion to dismiss.

Preliminary Injunction:

In order to prevail on a motion for preliminary injunctive relief, the moving party must demonstrate a clear showing of probable success on the merits *and* the possibility of irreparable injury. Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687 (2d Cir. 1973). However, "where the balance of hardship tips decidedly toward the party requesting the temporary relief", Dino De Laurentiis Cinematograficia S.p.A. v. D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966), the burden of demonstrating probable success on the merits is reduced *if* the moving party "has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation." Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.) cert. denied, 394 U.S. 999, 89 S.Ct. 1595, 22 L.Ed.2d 777 (1969), *accord* Exxon Corp. v. City of New York, 480 F.2d 460 (2d Cir. 1973), Gulf & Western Indus. Inc. v. Great Atlantic & Pacific Tea Co., Inc., *supra*.

In order to determine the extent to which plaintiffs' claims measure up to these standards it is obviously necessary to consider, in some depth, the substantive content of the right of privacy.[10]

The Right of Privacy:

The plaintiffs assert that the state's systematic collection of all prescriptions for Schedule II drugs, which by statutory command must contain the patient's name, and the subsequent computerization of this information, violate their constitutionally protected right of privacy. While the Constitution does not specifically proclaim any general right of privacy, certain provisions of the Bill of Rights have been held to confer a guarantee of privacy. As early as 1885 the United States Supreme Court recognized that the Fourth and Fifth Amendments insure "the sanctity of a man's home and the privacies of life." Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1885). Yet, for many years the Court would not go beyond the specific strictures of the Constitution to protect individual privacy.[11]

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) in which an electronic listening device was attached to the outside of a telephone booth, the Court abandoned the trespass concept of Fourth Amendment

---

[10] In their briefs and on oral argument before the three-judge court plaintiffs abandoned the equal protection claim which they had pressed in the earlier proceedings, and that issue, therefore, is no longer a question in this litigation.

[11] See, *e. g.*, Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 729 (1928), in which the Court concluded that wiretapping is not a "search" within the meaning of the Fourth Amendment. Ultimately, the limitations imposed by *Olmstead* were lightened.

violation and chose instead to protect "the privacy upon which [the individual] justifiably relied." *Id.* at 353, 88 S.Ct. at 512. Even here, however, the protection of an aspect of individual privacy derived not from any general, unspecified rights, but rather, from a specific provision of a guaranteed freedom.

The First Amendment has also been interpreted to encompass certain privacies necessarily included within the scope of its specific mandates. Thus, in NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) the Court, in protecting the integrity of the membership lists of a private organization, recognized the "freedom to associate and privacy in one's associations," *id.* at 462, 78 S.Ct. at 1172, which emanates from the guarantees of speech and assembly. Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957), in limiting the scope of congressional committee questioning of individuals, made note of the need "to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly." *Id.* at 198-199, 77 S.Ct. at 1185. Similarly, the First Amendment has been held to include a correlative right to receive information and ideas. Thus, the attempt to criminalize the mere private possession of obscene material was found to be unconstitutional. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

These rights of privacy discussed above are only examples of the protection afforded pursuant to specific provisions of the Bill of Rights. The plaintiffs here, however, do not contend their claim is derived from any particular section of the Constitution. Rather, they assert an independent right of privacy first given cognizance by the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Al-

though sharply divided over the exact origins of such a right, a majority of the Court recognized the existence of a constitutionally protected "zone of privacy" which shielded the individual from unreasonable personal intrusions by federal or state governments. This principle has been reasserted in a number of subsequent cases. See, *e. g.*, Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). Each of these cases involved instances of sexual conduct, and as recently noted in this Circuit, "the right to privacy which thus far has been granted constitutional protection relates only to 'the most intimate phases of personal life' having to do with sexual intercourse and its possible consequences. . . ." Roe v. Ingraham, *supra* 480 F.2d at 107, quoting Rosenberg v. Martin, 478 F.2d 520, 524 (2d Cir. 1973).

Plaintiffs' claims, therefore, raise novel and serious questions with potentially far-reaching consequences as to the permissible reach of the protection afforded by the right of privacy as an independent constitutional guarantee. In order to decide the motion before us, however, we need not, at this time, fully define the limits of that right.

Plaintiffs have conceded the constitutionality of the New York law as it existed prior to the effective date of the Controlled Substances Act. Pursuant to the provisions of that now repealed statute—the Narcotic Drug Control Act, New York Laws 1953, ch. 879, §§ 3300-3366, as amended—all prescriptions were required to bear the patient's name, New York Laws 1961, ch. 206, § 3301(32), the pharmacist dispensing the prescribed drug had to retain the prescription in his file for a period of two years, New York Laws 1953, ch. 879, § 3322, subd. 1(c), and the pharmacist's files had to be maintained "so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this article." *Id.*[12]

It is evident, therefore, that the nature of the information required to be revealed by individual legitimate drug users remains essentially the same. Under the old law, however, the accumulation of records began and ended with the individual pharmacist, without any attempt at centralization. Now, of course, although the prescription information remains the same, the data is transmitted to a single data-collection facility. Plaintiffs' complaints, therefore, go only to this centralized collection of information ("record-keeping") rather than to the nature of the information obtained in the first place ("reporting").

This essential distinction between reporting and record-keeping in respect of infringement of constitutional proscriptions was most recently noted in Stark v. Connally, 347 F.Supp. 1242 (N.D.Cal. 1972), appeal pending 41 L.W. 3509 (1973). In that case the plaintiffs challenged the provisions of the Bank Secrecy Act, 31 U.S.C. §§ 1051-1122. The record-keeping provisions of the statute required banks to keep the customary ledger records of individual accounts and microfilm copies of all checks, drafts or other instruments drawn on, presented for payment to, or received for deposit by the bank. The reporting provisions gave the Secretary of the Treasury virtually unlimited power to require the reporting of all business and individual financial transactions, regardless of size.

It was only as to the *reporting* provisions relating to domestic transactions that the court found the statute transgressed constitutional guarantees of privacy, and then only because of the particularly broad discretion given to

---

[12] See, also, New York Laws 1953, ch. 879, § 3334 which permitted access to the files by United States officials in regard to enforcement of the federal drug laws.

the Secretary to require submission of information about all aspects of every financial transaction. Thus, *Stark* would support plaintiffs' position here only if the New York State Commissioner of Health had been given broad powers to delve into intimate details of the individual's medical history. In fact, the extent of the reporting provisions, namely, the insertion of the patient's and doctor's names on a prescription, are here not deemed offensive, and thus *Stark* supports defendant's contention that the Act does not unconstitutionally encroach upon plaintiffs' right of privacy.

Equally important for the defendant is Thom v. New York Stock Exchange, 306 F.Supp. 1002 (S.D.N.Y. 1969), affd. 425 F.2d 1074 (2d Cir.), cert. denied 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64 (1970). There plaintiff challenged a New York law requiring all persons employed by member firms of national security exchanges to be fingerprinted as a condition of employment, N.Y. General Bus. Law § 359-e(12) (McKinney's Consol. Laws, c. 20, Supp. 1972), claiming that the statute was, *inter alia,* an unconstitutional invasion of his right to privacy. The court noted that the plaintiff did not contest the state's right to investigate employees of national security firms but only objected to being fingerprinted.

> But fingerprinting under the statute is only a means of verifying the required information as to the existence or nonexistence of a prior criminal record. It involves no additional intrusion into the personal lives of the employees and applicants. The submission of one's fingerprints is no more an invasion of privacy than the submission of one's photograph or signature to a prospective employer, which the Stock Exchange rules still require. *Id.* at 1009 (Footnote omitted.)

Thom emphasizes once again the underlying fallacy of plaintiffs' argument. Any invasion of privacy which occurs under this statute would appear to result from the original insertion of a patient's name on the prescription and its delivery to the pharmacist rather than the subsequent centralized collection of these documents. Furthermore, the plaintiffs have been unable to produce any evidence, either by affidavit, scientific study, official document or otherwise, which provides even the slightest hit of actual, or even likely, injury which will result to the plaintiffs if the drug reporting system becomes operational.[13] Indeed, the

---

[13] The plaintiffs argue that the very act of coding a patient's name into a centralized computer would result in the unwarranted invasion of a constitutionally protected right to privacy. At oral argument this proposition was supported primarily by counsel's reference to the general threat of privacy posed by ever-increasing capacity of data-collection systems and computer informational transfer on the one hand, and the more specific harm flowing to particular individuals consequent to the perpetuation of incorrect data and the unauthorized divulgence of private information.

Plaintiffs' fears are shared by many and have within the last few years generated considerable literature. The seminal work is Westin, "Privacy and Freedom" (1967) in which the author, as Chairman of the Special Committee on Science and Law of The Association of the Bar of the City of New York, first defined privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." *Id.* at 7. After examining the "new tools for invading privacy" he concludes that the governing institutions of our society have been remiss in maintaining the balance of privacy in this country and that without immediate action we are threatened with subjugation to the tools of science. Interestingly enough, Westin, five years later, has coauthored, as Project Director of the Project on Computer Databanks of the Computer Science and Engineering Board of the National Academy of Sciences, the only thorough study of the actual manner in which operating computer systems have influenced individual privacy. Westin and Baker, "Databanks in the Free

(*footnote continued on following page*)

Memorandum of Assemblyman Chester Hardt, Chairman of the Temporary State Commission to Evaluate the Drug Laws, to Members of the Legislature, which was submitted as an exhibit to *plaintiffs'* moving papers, reflects favorably on defendant's position. This memorandum, along with the Interim Report and the affidavit of Dr. Robert Whalen, Second Deputy Commissioner of the New York State Department of Health, all demonstrate 1) that the state perceives itself to be in the throes of a crisis situation resulting from the rampant illegal use of drugs; 2) that the diversion of legal drugs to illicit use is a substantial contributing factor in this dangerous situation; 3) that the responsible state officials have engaged in serious, protracted and extensive study and research, including the solicitation of advice and recommendations from various representatives of special interest groups and the public at large, all of which resulted in the proposed legislation; and 4) that the methods ultimately decided upon appear on their face to be reasonably calculated to effectuate the purposes for which they were established, namely, to effectively monitor the ebb and flow of the legal drug trade so as to identify sources and methods of diversion.[14]

(*footnote continued from preceding page*)

Society: Computers, Record-Keeping and Privacy" (1972). This study, like its predecessor, does not make light of the awesome capabilities of the computers. Yet, it concludes that: "Our finding is that [the earlier prediction that computers would destroy practical boundaries of privacy] does not fit the computerized record systems in existence in 1970-72." *Id.* at 243.

[14] Plaintiffs argue that other states have adopted less restrictive legislation which does not require the centralized collection of patients' names. The validity of the New York law is not undercut by the existence of different laws elsewhere, particularly when the enactment of the instant statute was preceded by extensive research and study which demonstrates the state's attempt to construct a statutory scheme responsive to local needs.

The constitutional right of privacy, obviously, is not an absolute bar to all government action that intrudes into one's personal life. The critical question is whether the objective which the regulation seeks to accomplish is necessitated by a subordinating state interest justifying the degree and consequences of the resulting personal instrusion. See, *e. g.*, Roe v. Wade, *supra*, 410 U.S. at 153, 93 S.Ct. at 727; Roe v. Ingraham, *supra* 480 F.2d at 108. In seeking a preliminary injunction the burden is on the plaintiffs to demonstrate a probability of success or at least the existence of a serious and substantial question warranting further deliberation. Robert W. Stark, Inc. v. New York Stock Exchange, 466 F.2d 743, 744 (2d Cir. 1972), Inmates of Attica v. Rockefeller, 453 F.2d 12 (2d Cir. 1971).

In order to obtain preliminary injunctive relief, the plaintiffs are bound to show, at the very least, a substantial legal foundation for their claim that the reporting provisions of the statute violate their right of privacy *and* that the consequences of the resulting intrusions are not justified when considered against the state's interest. However, the plaintiffs have not produced any evidence which demonstrates conclusively, or even supports inferentially, the conclusion that, assuming the right to privacy will be extended to cover this case, the competing interests of the state are not sufficient to overcome whatever injury they may suffer. It is this lack of proof which, at this stage of the proceedings, causes plaintiffs' success on the merits to be insufficiently probable and their claim to be decidedly insubstantial.

Having reached this conclusion, it is not necessary to decide the question of irreparable injury or tipping of the balance of hardships. It should be noted, however, that the state's efforts are directed against a very real and pressing emergency requiring immediate and effective re-

sponse. The injury to the state and its people resulting from any delay in implementation of programs designed to deal with this problem may be quite significant. On the other hand, there is no evidence of any immediate injury threatening the plaintiffs other than the computerization of their names at the Department of Health and even this injury is easily susceptible to remedy, should the plaintiffs ultimately prevail, merely by ordering the state to destroy its records and erase the tapes.

Motion to Dismiss:

The defendant's motion to dismiss, subject as it is to the most favorable reading of plaintiffs' complaint, cannot be sustained. The discussion above demonstrates only that at this time the plaintiffs have not met the heavy burden required to convince this court of the propriety of a preliminary injunction. On the other hand, the plaintiffs ought to be allowed to explore more fully the outer reaches of the right to privacy itself and to submit the necessary intensive and detailed analysis of the competing interests of the state and the individual. Specifically, the plaintiffs must be afforded the opportunity to demonstrate that the computerization of names is not necessary for the accomplishment of the state's goals, that the controls developed by the state are inadequate to protect against unauthorized disclosure of the computerized information and that the injury to the plaintiffs resulting from the implementation of this system of centralized filing is sufficiently serious to overcome any competing state interest.

The motion to dismiss is denied. The motion for preliminary injunction is denied and the restraining order heretofore entered is vacated.

So ordered.

Answer.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD ROE, an infant, by ROBERT ROE, his parent, et al.,
Plaintiffs,

against

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York,
Defendant.

73 Civ. 1303

GEORGE PATIENT, et al.,
Intervenors,

against

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York,
Defendant.

73 Civ. 1431

Defendant for his answer to the complaints herein, respectfully alleges:

As to 73 Civ. 1303

FIRST: Denies as to paragraph "1" that plaintiffs bring this action "on behalf of all others similarly situated . . ." There is no request pursuant to Rule 23 for a class action order.

Answer.

SECOND: Denies knowledge or information sufficient to form a belief as to paragraphs "3", "4" and "5".

THIRD: Denies knowedge or information sufficient to form a belief as to paragraph "6" except as otherwise appears from the records of the Secretary of State of the State of New York.

FOURTH: Denies so much of paragraph "9" as to physicians' dispensing, Public Health Law § 3331(6) since the statute has been amended; and as to P.H.L. § 3371(1)(a), in that regulations have been issued by defendant further regulating disclosure of confidential information.

FIFTH: Denies each and every allegation contained in paragraphs "11", "12" and "13". As to "12", the action involves a hypothetical state of fact, contemplating improbable violations of law and statute.

As to 73 Civ. 1431

SIXTH: Denies as to paragraph "1" that plaintiffs bring this action "on behalf of others similarly situated . . ." There is no request pursuant to Rule 23 for a class action order.

SEVENTH: Denies so much of paragraph "2" which alleges jurisdiction pursuant to 28 U.S.C. 1331, the Commerce Clause, U.S. Const., Cert. 1, § 8.

EIGHTH: Denies as to paragraph "3" that the amount in controversy is in excess of $10,000.

NINTH: Denies knowledge or information sufficient to form a belief as to paragraphs "4", "5", "6" and "7".

Answer.

TENTH: As to paragraph "10", see paragragh "FOURTH" herein.

ELEVENTH: Denies paragraphs "12" and "13".

As to both actions—for a first separate and complete defense

TWELFTH: The plaintiffs fail to present an actual case or controversy.

For a second separate and complete defense

THIRTEENTH: The complaint(s) fail to raise a substantial question within the jurisdiction of this Court.

For a third separate and complete defense

FOURTEENTH: The complaint(s) fail to state a claim upon which relief may be granted.

For a fourth separate and complete defense

FIFTEENTH: The need for filing of the specified official prescriptions is established by the legislative history and such a determination is solely within the discretion of the legislature. A court cannot look behind or review this discretion.

SIXTEENTH: The State has a legitimate interest in protecting public health to require filing. Hypothetical injury to plaintiffs is inadequate to overcome this interest.

Answer.

FOR A FIFTH SEPARATE AND COMPLETE DEFENSE

SEVENTEENTH: The statute itself and regulations promulgated by defendant are adequate to protect against unauthorized disclosure of computerized information, assuming any right of privacy applies to prescriptions.

EIGHTEENTH: Unauthorized disclosure is a violation of criminal statutes and not to be presumed.

WHEREFORE, it is respectfully requested that the complaint(s) be dismissed.

Dated: New York, New York
September 26, 1973

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
By

s/ .....
A. SETH GREENWALD
Assistant Attorney General
Attorney for Defendant

Stipulation (Legislative History).

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that, for purposes of the above entitled action, the following documents constitute the legislative history of the sections in Article 33 of the Public Health Law at issue herein:

1. Reporting of Sales of Dangerous Drugs, Second Interim Report of the Temporary State Commission to Evaluate the Drug Laws (Albany, N.Y. April 5, 1971);

2. Proposed New York State Controlled Substances Act and Revision of the Penal Law, Interim Report of the Temporary State Commission to Evalulate the Drug Laws (State of New York—[1972] Legislative Document No. 10); and

3. Memorandum of Chester R. Hardt, Chairman of the Temporary State Commission to Evaluate the Drug Laws (Appendix to Court of Appeals, pp. 40a-44a).

and

IT IS FURTHER STIPULATED AND AGREED that the foregoing is without prejudice to the right of any party to offer tapes,

Stipulation (Legislative History).

transcripts, exhibits or other material referred to in the document described in paragraph "2" hereinabove.

Dated: New York, New York
June 20, 1974

SHEA GOULD CLIMENKO & KRAMER

By MICHAEL LESCH
A Member of the Firm

and

SOLOMON Z. FERZIGER, Esq.

Attorneys for Plaintiffs

LOUIS J. LEFKOWITZ, Esq.
Attorney General

By .....
Assistant Attorney General
Attorney for Defendant.

SO ORDERED:

.....
U. S. D. J.

Chester Hardt Memorandum.

STATE OF NEW YORK

TEMPORARY STATE COMMISSION

TO

EVALUATE THE DRUG LAWS

STATE CAPITOL, ROOM 250
ALBANY, NEW YORK 12224
(510) 472-8511

TO: MEMBERS OF THE LEGISLATURE

FROM: Chester R. Hardt, Chairman

RE: TRIPLICATE PRESCRIPTIONS; NEW YORK STATE CONTROLLED SUBSTANCES ACT; EFFECTIVE APRIL 1, 1973.

Many of you have received communications from medical practitioners concerning the New York State Controlled Substances Act particularly the triplicate prescription requirement for Schedule II Substances. To assist you in replying, I have prepared the enclosed memorandum which should enable you to respond to these inquiries.

If my office can be of further assistance to you, please let us know.

The triplicate prescription provision is but one facet of the comprehensive system of control against diversion of lawfully manufactured, distributed, prescribed and dispensed psychoactive drugs enacted by the Legislature and the Governor in 1972. Public Health Law licensing provisions have been tightened, specific rules regarding safeguards for dispensing methadone have been enacted, and greater preventive enforcement authority has been given to the State Health Department.

The triplicate prescriptiton concept was first proposed by our Commission in its Interim Report of April 5, 1971. Initial reaction appeared favorable, and the Commission proposed triplicate prescriptions as part of the system to control the illicit flow of drugs with a medical use in its next draft report, circulated to medical societies and all interested parties throughout the State in September of 1971. Hearings were held in major cities, and both invited and volunteer speakers were heard from every aspect of every discipline involved. Alternative proposals were actively solicited. The reaction of all of the experts, most of the laymen, and all of the government agencies contacted was that voluntary cooperation to stem the tide of illicit therapeutic drug traffic was not possible in this State.

However, when all of the evidence was in, the Commission did not recommend that all dangerous drugs require a triplicate prescription. We believed, and we still believe, that there continues to be room for voluntary curtailment of the prescribing and dispensing of controlled substances, particularly the short-acting barbituates, which are still in Schedule III. We believe that if the terrible epidemic of short-acting barbituate abuse in Southern California is averted in New York State, the triplicate prescription provision will not be extended to these substances. With regard to those drugs now in Schedule II, however, such as morphine and amphetamines, the evidence at our hearings was clearly that if we did not already have an epidemic with these drugs, we were on the threshold of one.

At the outset, multiple prescriptions will be required only for Schedule II substances. These include the major narcotics, such as pure opium, pure codeine, morphine, Demerol and Dilaudid. Also included are the amphetamines, including methamphetamine, and amphetamine-like substances, such as Ritalin and Preludin. There is a

likelihood at this time that methaqualone (Quaalude) will also be included. Subject to exception from the multiple prescription requirement will be certain compounds containing amphetamines whose other ingredients vitiate the stimulant effect of the amphetamines. These substances represent a small fraction of the drugs dispensed or prescribed in the usual course of a physician's practice.

This requirement was conceived, by the Legislature and the Governor, as an integral part of the Controlled Substances Act. The reason is that the relationship between prescribing practices and general patterns which create a climate hospitable to drug abuse has been firmly established by the overwhelming preponderance of evidence received by our Commission. Up to 30 per cent of all those addicted to heroin since 1970 began their drug abuse by misuse of prescribed medications. The drug dependence and illness resulting from the over-prescribing of stimulants has been documented at every level of government and by nearly all responsible professionals. For example, a recent NIHH study revealed that although general practitioners represent but 30 per cent of all physicians, they account for 41 per cent of all prescriptions for psychoactive drugs. The stimulants, Ritalin and Preludin, were not originally contained in the federal Schedule II. Our Commission petitioned the federal government to include Ritalin and Preludin in their Schedule II, just as we have done in our Schedule II, based upon the experience of almost uncontrollable abuse of these amphetamine-like substances in Sweden following the prescription of amphetamines in that country. The Federal government did, indeed, add these substances to their Schedule II at our behest.

Here is how the multiple prescription system will work in New York State. Upon prescribing or dispensing a Schedule II substance, the practitioner will use an official

New York State form instead of a sheet from his usual prescription pad. Official forms will be provided by the New York State Department of Health. If the physician dispenses the substance, he will keep the original and forward two copies to the Department. If he prescribes the substance, he will give or mail to the patient the original and one copy. The patient will take both the original and the copy to the pharmacy. The pharmacist filling the prescription will sign his name upon the original and the copy and will note the date of delivery, and the registration number of the pharmacy. Once a month, he will send his accumulated endorsed copies to the Department. He will retain the original for five years.

Although official prescriptions are not refillable, such a prescription may authorize the dispensing of a maximum 30-day supply of the substance in question. All regular prescriptions for controlled substances in Schedules III, IV and V, including phenobarbital, may be refilled five times in any given six month period of time.

Prescriptions, including official prescriptions, may be mailed to long-term or invalid patients. Telephone prescriptions may be filled for all controlled substances, even for Schedule II narcotics, by phamacists, providing the pharmacist makes a reasonable attempt to verify the identity of the person representing himself to be a doctor, for example, by a callback, and providing that the physician follow up the oral prescription with an official or a written prescription, as the substance in question may require.

The New York State Controlled Substances Act materially tightens restrictions on divulging confidential information. Under present law, confidentiality of patient records simply does not exist with regard to law enforcement personnel who may inspect such records at will. Nothing relating to patient records may be disclosed under the new law, even in the course of a criminal investigation,

except upon a judicial subpoena. Moreover, under the new law measures must be taken in any administrative proceeding, against a practitioner, to seal exhibits and to delete the patient's name.

With regard to data processing techniques that will be used in connection with multiple prescriptions, the system will work as follows: information from the official prescription will be coded into a computer. The prescription copy itself will be kept separately in a coded batch. The batch number will be in the computer. At regular intervals, certain specific questions will be asked of the computer. These questions will be formulated at the highest administrative level and no question may be asked of the computer that has not been previously approved by the Department. The questions will relate to physicians who have prescribed and dispensed a greater amount of a Schedule II substance than could possibly be justified by the nature of their practice. The computer will also be asked to report on situations arising from lost or stolen prescriptions.

It is extremely important that you make note of the fact that, unlike many private health insurance programs that presently employ data processing techniques for determining costs and eligibility of patients, our proposed plan will *not* make use of massive print-outs of patients' names. The computer will not disclose identifying data about any patient unless, based upon previous reports, it is clear that such patient has been using stolen or forged prescriptions.

Law enforcement officials in both California and Illinois have been consulted in considerable depth about the use of multiple prescriptions, since they have been using them for a considerable period of time. They indicate to us that they are not only a useful adjunct to the proper identification of culpable professional and unscrupulous drug

abusers, but that they also give a reliable statistical indication of the pattern of drug flow throughout their states: information sorely needed in this state to stem the tide of diversion of lawfully manufactured controlled substances. Our independent investigation of these systems in California and Illinois has failed to reveal one single case of the invasion of a patient's right to privacy, despite the fact that these other systems make use of massive computer print-outs of patients' names, which we do not.

The people of the State of New York have time and again been demonstrated to be the most susceptible of all the people in the United States to drug abuse. It is the most deeply felt conviction of those involved in helping to curb drug abuse in this state that the multiple prescription requirement will be a safe and useful implement in this effort.

Pre-Trial Order on Consent.

[SAME TITLE]

On October 24, 1974, the attorneys for the parties to this action appeared before the Court at a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure and, as a result thereof, the following action has been taken:

I. *Stipulation of Facts*

The parties stipulate that the following facts are not in dispute in this action. Each party reserves the right to object to the materiality of any such stipulated facts and its relevancy to the issues:

A. *Manner In Which The Triplicate Prescription Forms Are Used By Physicians and Pharmacists*

1. Prior to April 1, 1973, the effective date of Article 33 of the Public Health Law and at all times thereafter, prescription forms for Schedule II drugs have been sent to all qualified physicians who ordered such forms.

2. Annexed hereto marked "Exhibit A" is the list of Schedule II drugs which appears in Article 33 of the Public Health Law. Annexed hereto marked "Exhibit B" is a letter from the Commissioner of Health to physicians instructing them how to obtain and use the forms and setting forth a list of some of the drugs, together with their trade names. The Commissioner of Health is authorized to reschedule Schedule III drugs or Schedule IV drugs as Schedule II drugs (see § 3338(2)), but

no such re-schedulings had been made as of February 11, 1974. There has been statutory reclassification. (See Chapter 97, Laws of 1973, a copy of which is annexed hereto marked "Exhibit "C".)

3. Acting under Article 33 of the Public Health Law, the Department of Health requires a physician dispensing a Schedule II drug to keep one copy of the prescription and mail the original and remaining copy in a pre-addressed envelope provided by the State of New York State Department of Health, Bureau of Controlled Substances, Licensing and Evaluation, 845 Central Avenue, Albany, New York 12206. A physician who only prescribes the drug but who does not dispense is required to keep one copy of the prescription form and give the original and copy to the patient, who must take them to a pharmacist in order to have the prescription filled. The pharmacist is required to keep the original prescription form and to send the remaining copy to Albany. (See §§ 3337 and 3333.)

4. The copy of the prescription form that is sent to Albany contains (a) the name, address, telephone number and BNDD number (now known as DEA number)* of the prescribing practitioner, (b) the date on which the prescription was issued, (c) the name, age and address of the patient, (d) the name and amount of the drug prescribed, (e) the maximum daily dosage thereof, (f) the signature of the practitioner, (g) the prescription number issued by the pharmacy, (h) the date the prescrip-

---

*"BNDD number" refers to the number given by the Federal Bureau of Narcotics & Dangerous Drugs ("BNDD"), now known as The Drug Enforcement Administration ("DEA"), to all practitioners who prescribe and/or dispense drugs and to pharmacists who dispense drugs.

tion was filled, (i) the Schedule II substance NDC number,* (j) the pharmacy BNDD number and (k) the signature of the dispenser. A sample copy of such a form is annexed hereto marked "Exhibit D".

B. *Organization of Bureaus of Department of Health Which Process or Use The Forms*

5. Dr. Arthur G. Baker, Associate Commissioner of Health for Community Health Services, is charged with overall responsibility for the triplicate prescription program. Two bureaus under his jurisdiction have responsibilities relating to the triplicate prescriptions—the Bureau of Narcotic Control ("BNC") and the Bureau of Controlled Substances, Licensing and Evaluation ("BCSLE"). The BNC, under its director, John J. Bellizzi, is responsible for conducting investigations concerning alleged violations of the Public Health Law relating to controlled substances. There are 24 narcotic investigators in BNC, distributed throughout the state as follows: 2 each in Buffalo, Rochester, Syracuse, White Plains and Albany, and the remaining 14 in New York City. The BCSLE, under its director, Joseph L. Cannizzaro, is responsible for processing of the prescriptions and security and retention of the prescriptions. BCSLE was formed after enactment of, and for the purpose of implementing, the triplicate prescription legislation. Twenty-four of its employees are principally concerned with such implementation. In addition, the Office of Electronic Data Processing ("OEDP"), a unit which is part of the Department of Health but not under Dr. Baker's jurisdiction,* participates in the processing of the prescription blanks by transferring the in-

---

*"NDC" refers to National Drug Code.

*At the trial, further evidence on this subject will be offered by defendant.

formation from the prescription blanks to discs to tapes which can be "read" by the computer. In April 1973, the director of OEDP was Harold Gottheim. The director of OEDP since March 1974 has been Joseph Bonacci. Implementation of the triplicate prescription law necessitated the hiring of 14 additional key punch operators and one additional computer operator.

C. *Processing of the "Cashed" Prescription Blanks in Albany*

6. In Albany, the prescriptions are received in the mail room of BCSLE, at 845 Central Avenue. They are taken unopened to a receiving room where they are opened, coded, put into batches of 100 each and logged by approximately nine clerks. Since April 1, 1973, the effective date of the law, prescription forms have been received at the rate of approximately 25,000 per week or over 100,000 per month.

7. The batches are then taken into a "processing room" which is part of the OEDP, where the information on the triplicate forms is keypunched onto discs and subsequently the information on the discs is transferred to magnetic tapes.

8. The prescription forms which have not yet been processed are stored overnight in a locked cabinet. Those which have already been processed are stored in a locked vault. The magnetic tapes containing triplicate prescription information are kept in a locked cabinet in an area of the processing room separate and apart from all other tapes and discs.

D. *Development of a Format for Presentation of the Information Contained On the Triplicate Prescription Forms Filed in Albany*

9. Prior to the enactment of the statute on June 8, 1972, no one from the Department of Health was asked to testify about the need for identifying information as to patients using Schedule II drugs. Although Bellizzi has been head of enforcement in New York since 1958, he was not consulted by the legislature about the need for triplicate prescriptions until after the statute was enacted.

10. After June 8, 1972, the Department of Health began to consider how the triplicate prescription information could be used. Bellizzi was sent to California and Illinois, two states which had triplicate prescription statutes, and found that the two principal areas of benefit were in deterring forgeries and over-prescriptions of the drugs. Thereafter, no memorandum was prepared by the Department of Health setting forth the questions to be answered by the system until memoranda dated June 20, 1973, October 11, 1973 and October 23, 1973, all of which were prepared more than one year after the statute had been enacted. However, from April 1973 to September 1973, the Department of Health was restrained from processing the prescription forms by this Court, the United States Court of Appeals for the Second Circuit and the United States District Court for the Western District of New York. The June 20, 1973 memorandum, prepared by Mr. Bellizzi for Commissioner Whelan, did not mention the possibility of apprehending patients who go from doctor to doctor to obtain excessive amounts of Schedule II drugs as a potential benefit of the system. The October 11, 1973 memorandum also did not mention the problem. The October 23, 1973 memorandum was divided into 18 questions to be answered monthly on a first priority basis, 25 additional questions

to be answered monthly, 3 questions to be answered quarterly, one question to be answered semi-annually and 5 questions to be answered on an "on request basis". None of the 15 questions to be answered on a "first priority basis" contained any request for information as to patients who go from doctor to doctor in order to obtain excessive amounts of Schedule II drugs.

11. Thereafter, on November 29, 1973, three schedules were prepared showing the information to be derived from the system (copies thereof are annexed hereto marked "Exhibit E", "Exhibit F" and "Exhibit G") and, in early December 1973, a further memorandum was prepared describing the format of the information to be obtained in greater detail. (A copy thereof is annexed and marked "Exhibit H"). According to Dr. Baker, the four basic purposes of the system were as follows:

(a) To facilitate study of the practicing habits of those practitioners who use an unusually large number of prescriptions. Dr. Baker plans to obtain a list of such physicians and then a printout of the types of drugs prescribed or dispensed by such physicians and to refer that information to the Bureau of Narcotic Control which will pursue an audit of such physician's practices to ascertain whether such usage was proper.

(b) To obtain the information contained on Exhibits E, F, and G.

(c) To obtain information on selected drugs that may present a problem of abuse. Dr. Baker plans to follow the same process of investigating physicians who prescribe these drugs as is described in subparagraph 11(a) above.

(d) To ascertain instances in which patients appear to be obtaining more than a 30-day supply of a controlled substance, possibly by obtaining prescriptions from more than one physician.

12. The only information from the computer which Dr. Baker contemplates would contain the names of any patients is a print-out of patients who have obtained more than a 30-day supply of a Schedule II drug in a 30-day period. The only reason given by Dr. Baker for the above print-out is that it will assist in the identification and investigation of persons who, using the same name, go from doctor to doctor to obtain an illicit supply of Schedule II drugs. The number of case reports of such violations was as follows from January 1, 1969 to May 12, 1974:

1974 — 1 case

1973 — None

1972 — None

1971 — 1 case

1970 — 1 case

—

1969 — 1 case

E. *Print-outs Now Being Produced By the State's System*

13. As presently in effect, the following print-outs are produced by the state's system:

(a) "Practitioner RX Transaction Record Edit Error Listing." This print-out sets forth errors which occurred in the process of transferring the information from the prescription form as filed in Albany to the computer tape on which the information is stored or to deficiencies contained on the prescription.

(b) "Schedule II substances dispensed and processed in month. . . ."

(c) "All prescriptions processed in month. . . ." This shows, *inter alia*:

(i) The number of prescriptions filled and the average number of prescriptions per practitioner;

(ii) The number of prescriptions dispensed by practitioners;

(iii) The number of prescriptions dispensed by pharmacies.

(d) "Report of duplicate prescriptions processed in month. . . ." This shows when two prescriptions with the same number were filled. While the purpose of this print-out was to detect possible forgeries or counterfeits, all duplications uncovered have resulted from errors in processing.

(e) "Unmatched BNDD numbers." This print-out was designed to show prescriptions filled where the practitioner's BNDD number listed on the prescription did not match the BNDD number shown on Department of Health records for the practitioner. It too was designed to protect against possible forgeries, but, in April 1974, "in the process of being modified."•

(f) "Patients with prescription total in excess of 30-day supply processed in month. . . ." This is the print-out designed to ascertain the identity of patients who go to more than one doctor to obtain an excess of a 30-day supply of Schedule II drugs within a 30-day period. Originally, this print-out did not contain patients' names, but, in April 1974, it was being altered so that patients' names would be included and

• Mr. Cannizzaro will testify, on behalf of defendant, that this print-out is no longer being used.

it is presently being printed out with the patients' names.

(g) "Alphabetical listing of practitioner master file." This print-out sets forth all practitioners that order triplicate prescription blanks and is used to facilitate the ordering and re-ordering of prescription blanks by the Department of Health and to check the practitioner's BNDD number.

(h) "New York State Department of Health list of licensed physicians." This print-out is used as a check in the ordering process.

(i) "Master mailing file." This print-out sets forth all physicians to whom triplicate prescriptions have been mailed in a month and is used for the same purpose as the print-outs described in subparagraphs "g" and "h" above.

14. All of the above print-outs are issued monthly except the "Practitioner RX Transaction Edit Error Listing" which is issued daily. The only person authorized to receive the print-outs from OEDP is Mr. Cannizzaro. Mr. Cannizzaro and Dr. Baker decide who should receive any of the information contained in the print-outs.

F. *Use of Patients' Names By the System*

15. The only print-out which contains patients' names is that described in paragraph 13(f) above. That print-out has been received by Mr. Cannizzaro since October 1973. Up to February 9, 1974, Cannizzaro had not given a single patient's name to BNC. By June 1974, BCSLE, under Mr. Cannizzaro, uncovered only two patients by use of the computer, who had apparently gone from doctor to doctor to obtain excessive amounts of drugs within a 30-day period. Mr. Cannizzaro wrote two memoranda, referring the names

of such patients to BNC. The two referrals were investigated by BNC. One investigation disclosed a *bona fide* patient relationship. The other is still pending.

16. In addition, BCSLE received approximately five or six requests from the BNC relating to particular patients. The substance of these requests was that an investigator had been informed that a patient was going to one or two physicians in a certain area and he wanted to obtain a listing of all prescriptions received by such patients. However, the computer did not have the capability to give the information requested. It now has the capability. At no time up to April 24, 1974 had BCSLE received a request for information in response to which it gave the identity of a patient to BNC. Since the triplicate prescription information has been on file in Albany and up to April 24, 1974, BNC had received no information whatever from BCSLE in response to any request made by Mr. Bellizzi, through whom all such requests are made and, in Mr. Bellizzi's opinion, stated on May 21, 1974, the computerized information has been of no assistance to BNC.

G. *Access to Information On the Computer*

17. The triplicate prescriptions are presently being processed on a Burroughs 3500 computer, which will soon be replaced by a Burroughs 6700 computer. There are several remote terminals that have access to the computer, but not to the triplicate prescription data. However, adjustments to the computer which would permit such access could be made.

18. In November 1974, at least 31 employees of the New York State Department of Health had access to all computerized information with respect to patients: two employees in the Office of the Commissioner for Community

Health Services, one employee in the Office of Management Analysis, four employees in the OEDP and 24 employees in the BCSLE.

19. No patient has ever been permitted to ascertain what information about him is held in the Department of Health or whether any such information is accurate and no verified request for such information has been received by defendant.

II. *Issues*

A. The parties agree that the issues to be tried are as follows:

(1) Does the centralized filing and computerization of the information, including the patients' names contained on official New York State prescription blanks with respect to Schedule II substances, invade the constitutional right of privacy of patients?

(2) Does such centralized filing and computerization invade the patient's constitutional right to receive medical care in accordance with his licensed physician's best medical judgment?

(3) Does centralized filing and computerization of official New York State prescription blanks violate the constitutional right of doctors to administer medical care in accordance with their best medical judgment?

(4) Is there a compelling state of interest for such centralized filing and computerization?

(5) Are the steps taken by the State adequate to protect patients from the risk of malicious or careless disclosure of such centralized and computerized information?

B. In addition, defendant believes that the following is an issue:

> Should the constitutionality of the provisions of the New York Public Health Law requiring the centralized filing of official New York State prescription blanks with respect to the prescribing and dispensing of Schedule II substances be determined by the application of the "compelling state interest" test or of the "rational basis" test?

III. *Exhibits*

Schedules of the exhibits which each party intends to offer at trial and of objections thereto are annexed hereto. Should any party desire to offer additional exhibits, prompt notice of that fact shall be given to the other party and to the Court in writing.

IV. *Witnesses*

The parties agree that the witnesses whom each party intends to call are as follows:

A. *Plaintiffs' expert witnesses:*

(1) Joseph Wasserman.

Summary of qualifications. Mr. Wasserman is president of Computer Audit Systems Inc., a firm which specializes in providing auditors and accountants with computer audit software, electronic data process training courses, consulting services, and computer security reviews of data centers. He has worked directly in the field of computer auditing for 12 years, holding management positions in the Bell Telephone System prior to assuming his present responsibility.

Mr. Wasserman has published numerous articles for the audit profession, including (i) "Control in an EDP Environment," September/October 1970 Internal Auditor; (ii) "Plugging the Leaks in the Computer System," September/October 1969 Harvard Business Review; (iii) "The Vanishing Trail," July/August 1968 Bell Telephone Magazine; (iv) "Internal Auditors, Where Do You Get Them—How Do You Train Them," Proceedings of the 25th International Conference of the Institute of the Internal Auditors, 1966.

Area of testimony. Mr. Wasserman will present an analysis showing that as of January 23, 1974, a date when he visited the computer facility used to process the triplicate prescription forms, (a) the physical security, procedural security and data security of said facility and the computer system located there were inadequate; and (b) computerizing the patients' name is not reasonably calculated to achieve the stated purposes of the system.

(2) Jerry M. Rosenberg, Ph.D.

Summary of qualifications. Dr. Rosenberg is Chairman and Professor of the Department of Management at Polytechnic Institute of New York, has also taught at Cornell University and Columbia University and was a visiting professor at the University of British Columbia and the Israel Institute of Productivity. Dr. Rosenberg is the author of various books and articles, including, "The Death of Privacy" (1969); "The Computer Profits" (1969); "The Need For A Renewed Conception of Technical Education" (1967); and "Automation, Manpower and Education" (1966). In addition, Dr. Rosenberg has testified at the hearings on "Federal Data Banks, Computers and the Bill of Rights" held by the United States Senate Sub-Committee on Constitutional Rights of the Committee on the Judiciary.

Pre-Trial Order on Consent.

Area of testimony. Dr. Rosenberg will testify as to the psychological damage to the individual from having his behavior perceived and recorded by a central agency.

B. *Plaintiffs' other witnesses:*

(1) Robert Roe.

(2) Mary Doe.

(3) Michael Moe.

(4) Jane Roe.

(5) Matthew Brody, M.D.

(6) Israel L. Schmierer, M.D.

C. *Intervenors' witnesses:*

(1) Martha Patient.

(2) Gerald Lustig, M.D.

(3) David Hain, M.D.

D. *Defendant's witnesses:*

(1) Joseph L. Cannizzaro.

(2) Joseph Bonacci.

Should any party hereafter desire to call any additional witnesses, prompt notice of their intention shall be given to the other party and to the Court. No witnesses may be called at trial unless so identified.

V. *Plaintiffs' Contentions*

Plaintiffs contend as follows:

A. The State can show no need nor compelling state interest which would warrant the centralized filing

Pre-Trial Order on Consent.

and computerization of the information, including the patients' names, contained on official New York State prescription blanks with respect to Schedule II substances.

B. Such centralized filing and computerization invades the constitutional right of privacy of patients.

C. Such centralized filing and computerization does not achieve any legitimate purpose of the State.

D. The means used by the State are unreasonably broad to achieve the designated purposes and thus constitute an invasion of the patients' constitutional right of privacy.

E. Such centralized filing and computerization invades the patient's constitutional right to receive medical care in accordance with his licensed physician's best medical judgment.

F. Centralized filing and computerization of official New York State prescription blanks violate the constitutional right of doctors to administer medical care in accordance with their best medical judgment.

G. The steps taken by the State are not adquate to protect patients from the risk of malicious or careless disclosure of such centralized and computerized information.

* * *

The trial herein shall be conducted in accordance with this Pre-Trial Order on Consent.

Dated: New York, New York, November , 1974.

U.S.D.J.

Pre-Trial Order on Consent.

CONSENTED TO:

SHEA GOULD CLIMENKO & KRAMER

By MICHAEL LESCH
A Member of the Firm

Attorneys for Plaintiffs

CONSENTED TO:

NORWICK RAGGIO & JAFFE

By MILES JAFFE
A Member of the Firm
Attorneys for Intervenors

CONSENTED TO:

LOUIS LEFKOWITZ

By .....
Assistant Attorney General
of the State of New York
Attorney for Defendant

Exhibit B, What You Should Know About Triplicate Prescriptions.

STATE OF NEW YORK
DEPARTMENT OF HEALTH

EXECUTIVE DIVISION
84 HOLLAND AVENUE
ALBANY, N. Y. 12208

November 28, 1973

Dear Doctor:

Recent actions by Federal courts in New York City and Rochester have resulted in a lifting of restrictions on the State Health Department with regard to the processing of triplicate prescription forms. In other words, the New York State Controlled Substances Act, which took effect April 1, 1973, including the processing of triplicate prescription forms, is in full force and effect.

As a result, the State Department of Health is analyzing information obtained from the triplicate prescriptions as they are filed with the Department. Summaries of this information will be published periodically in professional journals.

I am enclosing a copy of "What You Should Know About Triplicate Prescriptions," which I am sure you will find helpful.

Sincerely,

HOLLIS S. INGRAHAM, M.D.
Hollis S. Ingraham, M.D.
Commissioner of Health

Exhibit B, What You Should Know About Triplicate Prescriptions.

What You Should Know About Triplicate Prescriptions

Triplicate Prescriptions

1. Use for *Schedule II Drugs Only*
2. No more than a 30-day supply (when used as directed) may be prescribed at one time.
3. Triplicate Prescriptions are *not* refillable.

How to Obtain Triplicate Prescriptions

Triplicate prescription forms may be ordered, at a cost of $10.00 per 100, from the Bureau of Narcotic Control, 845 Central Avenue, Albany, New York, 12206. To reorder, complete the reorder form and return it to the Bureau of Narcotic Control.

How to Complete Triplicate Prescription Forms

1. Use ink, indelible pencil or typewriter. (*Please Be Legible*)
2. Be sure to complete *all* information requested on the form.
3. Give the original and one copy to the patient and instruct him to take *both* to his pharmacy when having the prescription filled. *The prescription must be presented to the pharmacy within 30 days of the date the prescription was signed. It cannot be filled after the 30 day period.*
4. Retain your copy in your office for 5 years and have it available for inspection.

Dispensing Schedule II Substances by Practitioners

If a practitioner dispenses Schedule II Substances from his office stock, he must:

Exhibit B, What You Should Know About Triplicate Prescriptions.

1. Complete the triplicate prescription form as indicated, including the dispenser's portion, i.e., National Drug Code Number and Dispenser's Signature.
2. Forward the original and one copy to the New York State Bureau of Narcotic Control, 845 Central Avenue, Albany, New York, 12206 *not later than the 15th of the month following the month in which the drug was dispensed.* Retain the practitioner's copy for 5 years.
3. Dispense the drug in a suitable and durable container with a firmly affixed Orange Label containing the following information:
   a. The legend prominently marked or printed in bold face or upper case lettering: "Controlled Substance, Dangerous Unless Used as Directed."
   b. Name of the drug or its National Drug Code Number
   c. Name and address of patient
   d. Name, address and telephone number of the dispensing practitioner
   e. Specify directions for use
   f. Date of filling

Emergency Oral Rxs for Schedule II Drugs

In an emergency a practitioner may *authorize an emergency oral* prescription for a Schedule II drug. No more than a 5-day supply may be prescribed orally. Within 72 hours after authorizing an emergency oral prescription, the prescriber must deliver the original and one copy of the triplicate prescription form to the dispensing pharmacist. The words "*Authorized for Emergency Dispensing*" shall be written or typed across the face of the prescription. If the pharmacist fails to receive such prescription, he must notify the State Health Department in writing within 7 days after dispensing the drug.

Exhibit B, What You Should Know About Triplicate Prescriptions.

GROUP PRACTICES

Each physician in a group practice who prescribes or dispenses Schedule II drugs must use his own triplicate prescription forms. Triplicate prescriptions are not transferable and may be used only by the practitioner to whom they were issued.

NEW YORK STATE DEPARTMENT OF HEALTH

TWO OR MORE OFFICES?

If a practitioner has two or more offices at different locations where Schedule II drugs are maintained or dispensed, separate books of triplicate prescription forms must be obtained for each location where Schedule II drugs are dispensed.

EXAMPLES OF SOME FREQUENTLY PRESCRIBED SCHEDULE II DRUGS REQUIRING THE USE OF TRIPLICATE PRESCRIPTION FORMS:

Analgesics	*Anoretics*	*Others*
Codeine	Benzedrine	Cocaine
DEMEROL*	BIPHETAMINE*	INNOVAR*
DILAUDID*	BIPHETAMINE T*	OPTIMAL*
DOLOPHINE*	DESOXYN*	PAREST*
LEVO-DROMORAIN*	DEXAMYL*	QUAALUDE*
LERITINE*	DEXEDRINE*	RITALIN*
MEPERGAN*	Dextro-Amphetamine	SOMNAFAC*
Morphine	ESKATROL*	SOPOR*
NUMORPHAIN*	METHEDRINE*	
Opium	OBETROL*	
PANTOPON*	PRELUDIN*	
PERCOBARB*		
PERCODAN*		

* Brand Names in Capitals

Exhibit B, What You Should Know About Triplicate Prescriptions.

For further information, call the nearest office of the Bureau of Narcotic Control:

NYS Department of Health
Taxation & Finance Bldg. No. 9
State Campus, Albany, NY 12226
Telephone 457-5150

NYS Department of Health
1222 Commerce Building
119 East Main Street
Rochester, New York 14604
Telephone 546-6556

NYS Department of Health
584 Delaware Avenue
Buffalo, New York 14202
Telephone 842-5038

NYS Department of Health
677 South Salina Street
Syracuse, New York 13202
Telephone 473-8388

NYS Department of Health
Two World Trade Center
49th Floor
New York, New York 10047
Telephone 488-3933

NYS Department of Health
901 North Broadway
White Plains, New York 10603
Telephone 761-7900

IF TRIPLICATE PRESCRIPTION FORMS ARE LOST OR STOLEN, NOTIFY THE BUREAU OF NARCOTIC CONTROL IMMEDIATELY.

jbesb

Transcript of Proceedings (12/2/74).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

RICHARD ROE, AN INFANT BY ROBERT ROE, HIS PARENT; JOHN DOE, AN INFANT BY MARY DOE, HIS PARENT; JAMES MOE, AN INFANT BY MICHAEL MOE, HIS PARENT; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER, and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs, — 73 Civ. 1303 R.L.C.

vs. — 73 Civ. 1431 R.L.C.

HOLLIS S, INGRAHAM, as COMMISSIONER OF THE STATE OF NEW YORK HEALTH DEPARTMENT,

Defendart,

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenors,

- x

Before:

HON. WILFRED FEINBERG,

Court of Appeals Judge

HON. INZBER B. WYATT,
HON. ROBERT L. CARTER,

District Judges.

December 2, 1974
10:10 a.m.

jbesb 2

APPEARANCES:

SHEA, GOULD, CLIMENKO & KRAMER, ESQS.
Attorneys for Plaintiffs

BY: MICHAEL LESCH, ESQ.
BARRY L. MENDELSON, ESQ.
SOLOMON Z. FERZIGER, ESQ.
DAVID STEINMANN, ESQ., of Counsel.

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the State of New York
Attorney for Defendant

BY: MICHAEL FOGARTY, ESQ.
A. SETH GREENWALD, ESQ., of Counsel.

NORWICK, RAGGIO & JAFFE, ESQS.
Attorneys for Intervenors (co-plaintiffs)

BY: H. MILES JAFFE, ESQ.
RISA DICKSTEIN, ESQ., of Counsel

-o0o-

JUDGE FEINBERG: Can we get the record at this point straightened out?

The intervenors are really co-plaintiffs; is that correct?

MR. JAFFE: Yes.

JUDGE WYATT: In a separate action?

MR. JAFFE: That's right.

JUDGE WYATT: Two separate actions for the same relief.

MR. JAFFE: We have been consolidated.

JUDGE WYATT: Not by order but by practice.

MR. JAFFE: I believe initially they were consolidated by order, going back to April of 1973, and then consolidated again in the Circuit Court, I believe, and I think we filed an order today consolidating for the purposes of trial, although I think that is redundant, frankly.

JUDGE FEINBERG: In any event, we will refer to your clients as plaintiffs, also. There are no more intervenors.

JUDGE WYATT: If you find any order of consolidation, I would be glad if you would bring it to our attention because a search of the docket entries by my staff has indicated that as far as the docket entries are

concerned, there has never been any order of consolidation.

MR. JAFFE: All right, your Honor. I will look for that.

JUDGE FEINBERG: Mr. Lesch?

MR. LESCH: Your Honor, we have throughout these proceedings referred to the plaintiffs by assumed names and with the Court's permission, we would like to continue to do so, even when they are sworn in.

If the Court wishes to have a list of the actual names of the plaintiffs, I have them here and we will give them to the Court.

JUDGE FEINBERG: Would you do that, please, and hand it up.

(Document handed to the Court.)

MR. GREENWALD: Of course I think the defendants are entitled to that list at this time.

MR. LESCH: Yes, they are, and I, unfortunately, only have one copy but I will advise the defendants of the actual names of the plaintiffs.

JUDGE WYATT: What about the plaintiffs in the other action?

MR. JAFFE: Your Honor, I did not make up a list but I have provided the names. We will provide the names to the Court.

BEST COPY AVAILABLE

JUDGE FEINBERG: Thank you.

Mr. Lesch?

MR. LESCH: I call Mr. James Moe.

JUDGE FEINBERG: I am handing this list back to the clerk to give to you, Mr. Lesch.

J A M E S M O E, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LESCH:

Q Mr. Moe, what is your profession?

A I am a lawyer.

Q How long have you been a lawyer?

A In New York State since 1961.

Q And were you admitted to the Bar prior to your admission in New York?

A I was admitted to the Bar of the State of Ohio in 1960.

Q And do you have any children?

A Yes.

Q How many?

A Two.

Q Do you have a son that suffers from a condition known as hyperkinesia?

A Yes.

Q How old is he, sir?

A Six and a half.

Q And when was his condition first diagnosed?

A Within the second six months of his life, sometime between achieving six months and a year.

Q Will you describe the condition of your son which is known as hyperkinesia?

A Well, as we saw it, it was principally uncontrolled motor activity. The child seemed not to be able to fully keep himself able to do as he wanted to do; inability to focus on anything for more than a few seconds at a time; some disorientation as he woke up in the middle of the night.

I think those were the principal symptoms.

Q And did you bring your son to a doctor when those conditions became evident to you?

A Yes. We had been talking to our pediatrician who then referred us to a child psychiatrist.

Q And did that doctor prescribe a drug?

A Eventually, yes.

Q And what was the name of that drug?

A Well, the ultimate drug that was used regularly has the trade name of Ritalin.

Q And prior to the time that that drug was used by your son, did you have conversations with physicians concerning the necessity of the use of that drug?

A Yes, I surely did.

Q Without going into individual conversations, can you give us the substance of those conversations?

A Yes. When it was suggested that an amphetamine or amphetamine-like drug be used, both my wife and I were concerned and expressed that concern and we had conversations with Dr. Porter, the child psychiatrist to whom we were referred; Dr. Alfred Fisher, the child's pediatrician; and several physicians of my personal acquaintance, all of which were trying to find out whether there was an alternative, what we might read to assist us in deciding whether it was suitable, and so forth.

Q And was there a unanimous opinion of those doctors?

A There was.

Q What was that opinion, sir?

A That the child would have to take something like Ritalin in order for him to have any hope of having a normal childhood and learning.

Q Did there come a time when you first learned about what I will refer to as the triplicate prescription

requirement, namely, the requirement that one copy of the prescription containing your son's name be filed in Albany?

A Yes.

Q When was that, sir?

A I don't recall the date but it was sometime after the -- shortly after the bill was enacted and before it took effect.

Q And with whom was that conversation?

A Dr. Robert Porter.

Q What did Dr. Porter say on that occasion?

A He told me of the new legislation and explained to me that he would have to henceforth, on a given date that was shortly coming, begin to file these forms with the State.

I protested strongly. I was very upset, which I expressed to him, and I told him that I had trouble accepting that the legislation could be as he described it, given the fact that the child was getting a normal treatment for a known medical disorder and this was the customary treatment for it.

I had difficulty -- and giving his age, four at the time, something like that, I had trouble accepting that the legislation really could be as he said it was and subsequently, I had a second conversation with him on the

same subject after I examined the legislation in which we agreed that the legislation did, indeed, seem to require it and which he and I discussed whether there was any alternative to keeping the child on an amphetamine since the legislation was the way it was.

Q And what was the result of that conversation?

A Well, he stated that he knew of no new choice of possible treatment for my boy and we had both agreed previously that that seemed to be the only thing we could do, so we agreed that we were, in essence, stuck.

Q And has your son received Ritalin since the effective date of the act, which was April 1, 1973?

A Yes, he has.

Q Do you continue to object to the requirement that a copy of the prescription with his name be filed in Albany?

A Yes, I surely do.

JUDGE WYATT: Are they actually filing the prescriptions?

THE WITNESS: I don't know, your Honor. I assume so.

MR. LESCH: No further questions.

BEST COPY AVAILABLE

CROSS-EXAMINATION

BY MR. FOGARTY:

Q Mr. Moe, how did you first learn about the statute?

A From Dr. Robert Porter.

Q Exactly what did he tell you about it?

A He told me that henceforth he would have to file a copy of the prescription form or a similar form with the State Government, showing precisely the amounts prescribed, the drug prescribed, the name of the person it was prescribed for and the address.

Q Are you familiar with prescription blanks generally?

A Yes.

Q What do they contain?

A Well, I believe the name of the patient, the address and, of course, the drug they prescribe.

Q What happens to those?

A Well, they are given to a pharmacist, I guess.

Q You don't know?

A I believe they are given to the pharmacist.

Q What happens to them then?

A I don't know. I believe the law requires the pharmacist to keep it for a certain period of time.

Q Didn't that disturb you, that your child's name was on that prescription blank?

A No.

Q Could you tell us what the difference is between that blank and this one?

A Well, it is hard to say what the operation of my mind was at the time that one upset me and not the other, but sitting here today, it seemed to me the major difference is the lack of organization that -- and the lack of system where, with whatever pharmacist you happen to turn it in to, kept for Lord knows how long and -- as opposed to going on to a central computer kept by a government.

Q What is your objection to the central computer run by a government?

A Well, the system of it. The ease of retrieval of the information and that it is kept by a government. I don't believe they have any right, the Government has any right to that information.

Q Are you aware that under the old prescription system, the Government had the right to the information?

A Well, I am aware of it only in the sense that I suppose they could demand any given pharmacists --

Q I don't want to know what you suppose.

A Then I shouldn't answer at all. No, I don't know.

Q You don't know?

A No; not familiar with it.

Q Who alerted you to the great danger with the change in method?

A Well, I described the conversation. I am not sure I understand the question.

Q How much detail did the doctor go into with you when he told you about this prescription law?

A Simply what I have stated -- that he would have to file a copy of every prescription or the same information with the State Government.

JUDGE WYATT: Tell me, did the doctor himself deliver to you the amphetamine?

THE WITNESS: Initially, yes; subsequently, no. After about six months we started getting it at a pharmacy.

JUDGE WYATT: When you got it at a pharmacy, I take it the doctor gave you two copies of the prescription.

THE WITNESS: I don't believe so. I think just one.

JUDGE WYATT: And you gave that to the pharmacist?

THE WITNESS: That's correct.

JUDGE WYATT: And your understanding was that the

doctor himself was sending the copy to the State?

THE WITNESS: After the new system. I believe so, yes.

JUDGE WYATT: I think technically the law is that it is the pharmacist who has to send the copy. I don't think it makes any difference.

MR. LESCH: It doesn't make any difference, but your Honor is correct, yes.

MR. FOGARTY: Except in the situation where the doctor dispenses it himself.

JUDGE WYATT: Yes, and the witness says there came a time when the doctor did not himself deliver the amphetamine.

BY MR. FOGARTY:

Q What happens to the information that goes to Albany?

A If I understand it, it is put on a computer, in a computer memory bank.

Q What happens then?

A I don't know what is done with it today.

Q Well, you have expressed a concern, an alleged invasion of privacy?

A That's correct.

Q Now, there must be a reason for that. The

computer in and of itself is a machine, an inanimate object.

What happens to the information that goes into there?

A When you say what happens to it, I don't know what actually happens to it.

If you are asking me what my fear is, I would be pleased to respond to that.

JUDGE CARTER: Isn't that really what the question is. Why should he be required to know what happens to it? It is a question of what his concerns are; isn't that what the issue is here?

MR. FOGARTY: Well, his concerns, yes, and the basis for them.

JUDGE CARTER: Well, the basis for them is the basis in his mind of what he fears.

MR. FOGARTY: That is what I am getting at.

JUDGE FEINBERG: What is it you are concerned about?

THE WITNESS: Well, by the time my boy is an active citizen, there will be a long file on him in a narcotics or dangerous drug context, in which somebody can get a print-out and use it, once they have it, for whatever they use it for.

I have visions -- however, perhaps they are

merely my own visions -- but I have visions of the boy getting into, say, some minor scrap with the law and a probation officer, or something of the sort, having a long history of drug use and given the emotional attitude towards drugs and the fact that the probation officer or, indeed, a judge wouldn't have done the research that I did or that the doctor, there may be a feeling that they have on their hands a different sort of person than they do.

There are so many emotional aspects to a long history of something called a dangerous drug and this is my concern; the fact that it is in one place under a name, can be retrieved presumably by using that person's name.

These are the things that -- the kind of things that bother me. It is hard to articulate precisely how I see it being a problem for the boy but, basically, I can't tell and I have had enough experience with the misuse of information by governments and others that I worry very much about the availability of this information in such a systematic way.

JUDGE WYATT: But this information would indicate that in every case your child received this drug on the prescription of the physician licensed to practice in New York.

Wouldn't that make a difference?

THE WITNESS: Well, firstly, your Honor, I don't know the form in which -- every form in which the computer will permit retrieval. I don't know whether it will give you everything in the file every time you press a button or whether or not it can be programmed or reprogrammed to give you selective information.

JUDGE CARTER: But suppose it does?

THE WITNESS: Gave the information that Judge Wyatt referred to?

Certainly that is better and less concerning than if it didn't but, no, the history would still be the same; there would still be the possibility of the governmental agent believing that the child had a long history of drugs, so long that it might be -- lead to a different view of the child than should be taken.

It is very difficult. I'm sorry; it is difficult to articulate exactly why that would concern me but it does.

BY MR. FOGARTY:

Q Let's assume, since you are an attorney and you know some of the procedures that are involved, that your son gets into a slight scrape with the law.

Don't you think that in a probation report, they would go see a physician and check the local drug stores and get the same information that you don't want disclosed?

A That would certainly be different than my understanding of the trouble taken.

Q In other words, you are presuming the worst of the State Department of Health and the best of everybody else.

MR. LESCH: Objection.

JUDGE FEINBERG: Sustained.

Q Are you aware of the provisions of Section 3371 of the law?

A Not by number.

JUDGE FEINBERG: What provision was that, Mr. Fogarty?

MR. FOGARTY: 3371, your Honor, confidentiality.

Q Do you know what confidentiality is, Mr. Moe?

A I know what confidentiality is.

Q Have you read this section?

A Yes, I have.

Q Do you know what it means?

A I know what it says.

Q I think we presume it means what it says, don't we?

A I have no reason not to.

Q Did that allay any of your fears?

A No.

Q Why not?

A Well, firstly, it is part of legislation. It was enacted by a group of legislators and can be amended by them.

Secondly, you know, that kind of thing can be abused and it can be misused. It can be procured for one reason and used for another.

The fact that a statute on the books says that information is confidential does not reassure me that in fact it won't be used.

Q In other words, you have no confidence in the law?

MR. LESCH: I object.

JUDGE FEINBERG: Sustained.

Q Or public officials.

If I were to state and we were to show in this case that the information in that computer is used for print-outs of about a half a dozen different types and that only one of those computer print-outs gives the name of the patient, would that allay your fears in any way?

A Well, not offhand. I don't fully understand what you are saying.

Q Well, you are talking about pushing buttons and a computer and getting print-outs and I am telling you that there are about a half a dozen print-outs coming out of the machine and that only one of them contains the name of the

patient.

A No.

Q This is going to be proven in this case.

A And what is your question?

Q Does that allay any of your fears?

A No.

Q No? Well, suppose I were to tell you and we were to produce evidence at this trial that the only time that a patient's name is printed out of that computer is when he receives in excess of a thirty days' supply within that period, would that allay any of your fears?

A No.

Q Why not?

A Well, I assume that someone has made the decision that the print-outs are to be taken out that way and I assume that decision is subject to change.

Q Well, suppose I were to tell you that that decision is based on determining violations of the drug laws, since it is against the law for a physician to prescribe more than thirty days' supply of a Schedule 2 drug,except in one instance that I will relate to you in a moment.

A What is your question?

Q The question is, would that allay any of your

fears? I am telling you why the print-out is made.

A No, it would not allay my fears.

Q Do the drug laws at all give you any cause for concern?

A Do the drug laws?

Q Violations of them.

A Certainly, as a citizen and a lawyer.

Q You are concerned about the welfare of your children which is why you are here.

Are you concerned at all that your son even for a limited time has taken what the legislature has described as a dangerous drug?

A Well, I was concerned about it prior to his having taken it. As I say, we did a lot of reading, talked to a great many people and were persuaded that it was not a matter of concern.

Q Do you know what the nature of the drugs are that are in Schedule 2?

A I believe it is a mixture of opium-related drugs and amphetamine-related drugs.

Q Have you ever heard them described as having a high incidence for abuse?

A Well, I don't know that I have but I can see that that would be a possible description.

Q Don't you think this concern for your child might extend to what he is taking?

A You mean taking of Ritalin?

Q The amount of it he takes.

JUDGE CARTER: What has that to do with the statute With the issue before us?

MR. FOGARTY: Your Honor, this prescription goes to Albany and the only print-out where it comes out with a name on it is where an excessive amount has been prescribed.

Now, this can occur through accident but the State Department of Health becomes aware of it through a print-out.

They don't go back to this witness. They go to the pharmacist, to find out if a mistake was made, and this is the point of my questioning.

The concern here for the child seems to be extremely limited and there don't seem to be any factors which will change his mind.

MR. JAFFE: I object to that. That is not what he testified to.

JUDGE FEINBERG: Sustained.

THE WITNESS: I'm sorry. Are you asking me --

JUDGE FEINBERG: There is no question before you.

MR. FOGARTY: I was replying to Judge Carter; I was

not asking you anything.

Q Are there any alternative drugs available?

A The only known alternative drugs for extreme hyperkinesia are also amphetamines, benzedrine, dexadrine.

Q How long is your son going to be on the drug?

JUDGE WYATT: Isn't he following the advice of a licensed physician? Is it his opinion that is relevant? He is simply doing what his doctor told him to do, as I understand it.

JUDGE CARTER: What difference does it make how long he is going to be on the drug?

MR. FOGARTY: Because there is another section of the law that I think may allay some of his fears and I am trying to point out that he doesn't know what the law is. He has been told something by a physician and that's all he knows.

JUDGE CARTER: The issue as far as he is concerned is that he thinks that somebody, someplace in Albany, the Government is going to have a history of the fact that his son has been using this drug over a period of time and he is concerned that it may be put to adverse use; that is clearly what his concern is.

Whether it is valid or not is another question, and you don't make it valid by asking him questions.

MR. FOGARTY: Well, I think I do, your Honor. If I can --

JUDGE FEINBERG: What is it you wish to prove by this cross-examination?

MR. FOGARTY: Simply that he has got some notions put in his head strictly by a doctor that are not valid.

JUDGE FEINBERG: Why don't you go ahead and see if you can develop that, if you can.

BY MR. FOGARTY:

Q Could you answer my question as to how long? What is the prognosis for your son taking this drug?

A Sometime in his early teens it would, typically, be no longer necessary.

Q Do you have any idea of how long the information is retained by the Department of Health? The third copy of the prescription, I am talking about.

A No, I do not.

Q Would it surprise you to learn that it is five years?

MR. LESCH: I object to that.

JUDGE WYATT: Well, is that written in the statute?

MR. LESCH: There is an amendment to the statute that talks about the copy of the prescription form but

nothing about the computerized information, so I think the question is unintentionally misleading.

JUDGE FEINBERG: Were you referring to the prescription form?

MR. FOGARTY: I said the prescription form and I believe it calls for the expunging of the records.

JUDGE FEINBERG: You can bring that out on redirect if you wish to.

There is a requirement for keeping it five years?

MR. FOGARTY: Yes, your Honor. It was amended in 1974:

"The Department shall cause to be expunged or otherwise destroyed within five years from the receipt thereof any record of the name of the patient received by it pursuant to the filing of the --"

JUDGE FEINBERG: Are you suggesting that that also refers to the information on the computer tapes?

MR. FOGARTY: I am suggesting that it says "any record."

JUDGE FEINBERG: Can't you answer that question?

MR. FOGARTY: I say yes, emphatically. I think the language is very clear.

Q Were you aware, sir, that the records would not be kept beyond five years?

A I was aware of it. I was not as --

MR. JAFFE: Objection, your Honor. The law is brand new --

JUDGE FEINBERG: Gentlemen, this is a case being tried before judges and not before a jury. I think we will get along much better if you each let counsel explore whatever they have to explore.

If you think it is going on too long, object. If you think something is completely outrageous under the rules of evidence, object, but let's not waste time on arguing legal issues because that is what we have been talking about the last few minutes.

MR. JAFFE: I am pointing out that at the time the witness' child took this drug, there was no five-year limit.

A I did not recall that, if I knew it.

Q Would that allay your fears in any way?

A It limits them to a five-year period.

Q You are aware of what the prescription looks like?

A I've handled them many times. I have no specific recollection of just how the form looks.

Q I would like to show you a Xerox copy of it and ask you if that is your recollection of it (handing).

A Yes, I've seen this.

Q Is there anything on that form that isn't on the ordinary prescription blank?

A Well, a great deal but --

Q For instance?

A Well, with reference to law, Mr. Fogarty, there is a lot of reference to Schedule 2 substance and things of that sort but if you mean --

JUDGE FEINBERG: Is that one of the exhibits in the pretrial order?

MR. FOGARTY: Yes. It is one of the exhibits in the original petition.

JUDGE FEINBERG: Is it Exhibit D?

MR. LESCH: Exhibit D.

JUDGE FEINBERG: Why don't you refer to Exhibit D, then, in your questions.

JUDGE WYATT: It is part of the pretrial order, is it not?

MR. LESCH: Yes, it is, your Honor.

A In terms of information about the patient, it appears to have the same information.

Q So that, in effect, there hasn't really been any change as to what information is made public there?

MR. LESCH: I object to all these questions on the grounds of relevance, your Honors.

JUDGE FEINBERG: Objection overruled.

A The change that I have addressed myself to relates to what is done with the information, not the form in which it is given to the pharmacist.

Q Would you agree with me, sir, that the same information is being made available to the State of New York, to the Department of Health?

A The information that is on here is --

Q Is the same as it was on the old prescription blank that they still use for other schedules.

A It may be. I don't know. You see, I don't know the procedures previously.

Q Your son was on this prescription before Schedule 2 went into effect, wasn't he?

A Yes.

Q You saw those prescription blanks, didn't you?

A Yes. The prescription blanks.

Q And you had them filled by the local pharmacist?

A Yes.

Q It is the same information, isn't it?

A Yes.

No, if you are asking me what my point was, my point is rather to do with the central system, the computerization of the information. Not the prescription

form.

MR. FOGARTY: No further questions.

MR. LESCH: I have no questions on redirect.

JUDGE FEINBERG: Thank you.

(Witness excused.)

J A N E P O E, called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LESCH:

Q Do you have a disease known as encephalitis?

A I had that years ago but I am all over it now. I sleep well now but not the way it was before.

Q And do you suffer from any other diseases now?

A Yes, I do.

Q What are they?

A My eyes go up. I keep on looking at the ceiling all the time.

Q And does your doctor prescribe any drug to you for that condition?

A Yes, he does.

Q Do you know what the name of that drug is?

A It starts with "T." I don't know how to pronounce it but I know it starts with a "T."

Q Who is your doctor?

A Dr. Matthew Brody.

Q Did Dr. Brody ever have a conversation with you about what is done with prescriptions for that drug?

A Yes, he did.

Q What did he say to you about that?

A I don't know.

Q Did he tell you anything about filing the prescriptions in Albany?

A Yes, he did.

Q Did he tell you that they went on a computer?

A Yes, he did.

Q And what did you say to Dr. Brody when he told you that?

A I don't know.

Q Did you tell him that you objected to it, that you didn't want your name on the computer?

A Yes, I did.

Q Why didn't you want your name on the computer?

A Because I am not a dope addict.

MR. LESCH: I have no further questions.

CROSS-EXAMINATION

BY MR. FOGARTY:

Q Mrs. Poe, did Dr. Brody tell you you were going to

be called a dope addict?

A No, he didn't.

Q He didn't tell you that?

A No.

Q Do you know whether that information in Albany says you are a dope addict or not?

A No.

MR. FOGARTY: No further questions.

MR. LESCH: I have no further questions.

MR. JAFFE: I have one question, if I may.

REDIRECT EXAMINATION

BY MR. JAFFE:

Q Your doctor did tell you, did he not, that you would be listed in Albany? Did he not tell you that?

A I don't remember if he told me or not.

Q He told you your name would be there as a user of drugs, did he not?

A Yes, I think he did.

(Witness excused.)

MR. LESCH: With the Courts' permission, may the plaintiff Patient elicit testimony from one of his witnesses?

JUDGE FEINBERG: Yes.

M A R T H A P A T I E N T, called as a witness by Co-Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JAFFE:

Q What is your present occupation?

A I am a housewife.

Q And would you tell the Court your present state of health?

A Excellent.

Q Do you suffer from any medical condition for which you receive treatment?

A Yes. I have migraine headaches.

Q And what is the drug or drugs which you take for that condition?

A I take fiorinal, codeine and Cathedot.

Q And are you familiar with what has been called here the triple prescription requirement in New York?

A Yes, I am.

Q Do you know which of those drugs must be prescribed by triplicate?

A The fiorinal and codeine. I don't know about the fiorinal but it is one pill.

Q How long have you been taking this drug?

A Since 1967.

Q And did there come a time when you were informed that the codeine would have to be prescribed by a different system?

A Yes. My doctor in New York told me in the late spring of 1973, early summer, I am not sure which it was.

Q And what did he tell you at that time?

A He told me that the prescription that he was going to write would have to be filed in triplicate, himself keeping one copy, the pharmacist keeping another copy and that the pharmacist would then send the information about what I was taking to a central computer or agency in Albany where it would be computerized.

Q What was your reaction to that?

A I was very, very angry. Very angry. I work from time to time with people who had trouble with confidentiality and computers and I was very, very upset with it.

Q Did you continue to take the drug?

A Absolutely. Could not help taking it.

Q Did there come a time when you attempted to get off the drug?

A Yes. At the end of last summer, I seemed to have a space when I didn't have the migraines. I usually get

them once a month and I only take the pills once or maybe twice during that month but I didn't seem to have any for a couple of months and I tried to do without it. My prescription was out. I had just moved so I tried to do without it.

Q Why did you try to do without it?

A Well, I had been thinking a great deal about the fact that it would be very nice to not be on any drugs at all. Nobody likes to take them and, also, I thought that it might be very nice to have my name not appear in a computer in Albany.

Q What happened after you ceased taking that drug?

A I did okay for about three months and then last month, I woke up with a blinding headache and my husband had to remain home from work and I had to go to Albany -- to Newburg to the hospital.

Q You were hospitalized for that migraine?

A Yes.

Q And that --

Q There they gave me fiorinal and codeine, that if I had had at home I probably wouldn't have had to go to the hospital.

Q And you were not normally hospitalized for the migraine?

A Never. First time.

MR. JAFFE: I have no further questions.

JUDGE WYATT: Did you take these pills or these drugs which you referred to only on the advice of a physician?

THE WITNESS: Absolutely.

JUDGE WYATT: And he was your own physician?

THE WITNESS: Yes.

CROSS-EXAMINATION

BY MR. FOGARTY:

Q I believe you were sitting in the courtroom when the previous witness was on the stand, the gentleman, the first witness?

A Yes, sir.

Q Did you hear the areas which I explored with him?

A Yes, sir.

Q Do you have any comments to make with regard to them?

A No, sir, other than that I agree with some of the things that he touched upon.

Q Now you say that your concern was aroused because you knew people who had trouble with computer information?

A Yes, sir.

Q What kind of information was that?

A Well, they generally had to do with arrest records and that sort of thing. I worked as a social worker for a while and as a case aide in a hospital and I ran into people who had had problems.

Q These were police records you were talking about then?

A In some cases they were and other cases they were psychiatric records, medical records of one sort or another.

Q Well, I would suggest that the information could be gotten from your physician if it was necessary anyway, couldn't it?

A Under a different set of circumstances than simply a print-out.

Q What kind of print-out --

A Well, I assume that my records with my physician are confidential.

Q Are you aware of the confidentiality provision of this statute?

A I am, having heard in this court that they are there.

Q But up until you came in this court, you didn't know about that, did you?

A No, I didn't.

Q Your physician didn't bother to tell you that?

A No, sir.

MR. FOGARTY: Thank you. No further questions.

REDIRECT EXAMINATION

BY MR. JAFFE:

Q Are you aware of other confidentiality provisions with regard to arrest records and --

A Yes, I am.

Q And have you had any experience in which those statutory confidentiality records have been breached?

A Yes, I have.

MR. FOGARTY: Objection.

JUDGE FEINBERG: Overruled.

Q You are familiar with the breaching of those records?

A Yes, I am, sir.

Q You also are aware from the questioning that this is only a statutory provision which is subject to change?

A Yes, sir, I am.

MR. JAFFE: No further questions.

MR. LESCH: I have no question.

JUDGE FEINBERG: Thank you.

(Witness excused.)

MR. LESCH: I call Dr. Matthew Brody.

M A T T H E W B R O D Y, called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LESCH:

Q Doctor, what is your profession, sir?

A I am a physician.

Q And how long have you been a physician?

A I was licensed in 1935.

Q Do you specialize?

A In neurology and psychiatry.

Q How long have you specialized in that area of medicine?

A Since 1942.

JUDGE WYATT: What kind of psychiatry, Doctor?

THE WITNESS: I am a psychiatrist.

JUDGE WYATT: You said you specialized in some sort of psychiatry.

THE WITNESS: I have my Boards in both neurology and in psychiatry.

JUDGE WYATT: Neurology and psychiatry.

THE WITNESS: Yes. Primarily I am a psychiatrist.

Q And would you give us your educational background?

A Yes, sir. Graduate of Harvard, 1931; Downstate Medical Center, 1935; rotating internship at Kings County Hospital and was in residence there in neurology. After that I spent four and a half years full time at Brooklyn State Hospital and since 1942, I have been in private practice.

Shall I continue?

Q Yes. Will you continue with your professional background to date?

A I am presently chief at Brooklyn Jewish Hospital, consultant at Brooklyn State Hospital, consultant at Gracie Square Hospital.

I have my Boards both in neurology and psychiatry. I am an impartial examiner in psychiatry for the Workmen's Compensation Board. I am a member of any number of societies, Fellow of any number of professional societies.

Q Have you written papers in the area of neurology and psychiatry?

A About fifty papers.

Q Have you lectured on those subjects also?

A Yes, sir.

Q Are you familiar with the Empire State Physicians Guild?

A Yes, sir.

BEST COPY AVAILABLE

Q Do you hold an office in that Guild?

A I am president of the Empire State Physicians Guild.

Q How long have you been president of the guild?

A I think four or five years.

JUDGE FEINBERG: Where is your office?

THE WITNESS: In Brooklyn. 41 Eastern Parkway, Brooklyn, New York.

Q In the course of your practice as a psychiatrist and a neurologist, do you have patients for whom you prescribe drugs that are listed on Schedule 2?

A Yes, sir.

Q What drugs are those, sir?

A The drugs primarily Ritalin, dexamine, rarely the soporifics, rarely the drugs which are used to encourage sleep. Most of the other drugs on Schedule 2 I rarely use.

Q And what are the medical and neurological conditions that are present before you will prescribe such drugs on Schedule 2 as you have just named?

A The amphetamines are used in treatment of narcolepsy. That is a condition in which the patient has an uncontrollable desire to fall asleep and will respond only to the amphetamines.

The amphetamines are also used in a condition

known as oculogyric crisis.

This is one of the sequela, one of the complications of the 1919 encephalitis epidemic which leaves the patient with various Parkinson-like symptoms and one of the rarer complications of this disease is oculogyric crisis, and when the patients have this, they lose control of the eyes, the eyes move uncontrollably in one direction or the other.

It is associated with enormous panic and anxiety. At one time it was thought to be a hysterical condition but now we know it to be organic. The exact place where the organic lesion is no one knows for sure. We have ideas. That responds to amphetamine.

Amphetamine is also used in the treatment of epilepsy. It was originally used when people were made drowsy by phenobarbital or ditantin and it was found that, paradoxically, it helped in certain patients to reduce the number of seizures.

Ritalin and amphetamine are used in the hyperkinetic disorders of childhood. There are a number of conditions which fall into or which are called the hyperkinetic disorders in childhood.

Do you want a description of that?

Q Yes.

A This is a condition which affects something like five to fifteen person of school children. It is more common in children of the deprived socioeconomic status, somewhat more common in males than in females and somewhat more common in first-born children.

They start off life with a motor disturbance. Either there is too much motility and the backs will arch up and they are brought to the breasts and this provokes a lot of anxiety in the mothers and they feel that they are being rejected, or they are flaccid.

I have written a paper on the complications of kernicterus with Dr. Alexander Weiner, the discoverer of the Rh factor, and at that time I pointed out that the children were inclined to show delayed psychomotor development, but later on, proved to be of normal intelligence.

In this paper I recognized that these kids were extremely active. I didn't have sense enough to know I was dealing with a new condition and I had no concept of what produced the activity. I think the theory at that time was all wrong.

There are other conditions now which will produce the thing and these children can't control their motor activity. They climb out of the crib much too soon

and when they begin to totter, they race around; when they walk, they are running all over the place and get into all kinds of difficulty.

In school they are so restless that they can't pay attention and often fail and then the business of failing sets up a kind of a vicious circle which disturbs them no end. I think initially they are looked upon as bad behaviors and in school they are looked upon as conduct disorders.

Paradoxically, these children do terribly when given tranquilizers. They get worse and they quiet down when they are given the mood elevators, Ritalin and dexamil.

Amphetamines are also used.

I have my own theory of why it works this way but I don't think anyone knows for sure.

These children never become the abusers of downies and uppies of adolescence. These kids who are brought up have to receive dexamil or Ritalin, otherwise they fail, and they are in a mess the rest of their lives with a high suicide rate at puberty.

As a matter of fact, you see very little of these hyperkinetic disorders recently, because the pediatricians take care of them and do a much better job

than I was able to do before we had these drugs. These are hyperkinetic disorders.

JUDGE WYATT: Can they walk without assistance? In other words, can they go from one side of the room to the other? Can they direct their movement to where they want to?

THE WITNESS: They are more mobile than the other children. The children that I described as the rarer group who start out with the disease, the kernicterus, "icterus" means yellowness, "kern" of the nucleous of the brain, and it is due to Rh sensitivity, these kids are flaccid in the period right after birth and they walk late and they sit up late and do everything late.

Then when they start walking and doing things, there is very little that you can find on neurological examination but they overdo it and they are constantly restless.

The other group of kids are hyperkinetic from birth. When the mother starts feeding them and the kids arch, that puts the mother in a tizzy and she thinks she is being rejected and they, too, continue this hyperactivity. This continues until adolescence.

Now, another place where the amphetamines and Ritalin is of value is in the schizo-affected disorders.

These patients are technically a schizophrenic but they do quite well in shock therapy or if they are treated for the depressions.

The kind of illness which is common after childbirth, patients, basically schizophrenic patients who have a great deal of hypochonrial pains, in which there is a "my back is killing me; I have a stabbing pain here or a twisting pain in the head," they do well in these depressive episodes in shock therapy but Ritalin and benzedrine are extremely efficacious in some of the patients.

I think I have covered most of the disorders which are treated.

MR. FOGARTY: If your Honors please, I don't see the need for this testimony.

The statute itself says these drugs have therapeutic value in medical use. I don't think we have to go into what they are.

JUDGE FEINBERG: I think it has gone far enough.

BY MR. LESCH:

Q Now, Doctor, in situations where triplicate prescriptions are required to be filed, do you have a practice of advising the patient?

A We have been advised that we have an obligation

to inform the patient.

Q Have you made a study or observations as to the reaction of the large number of your patients when you have advised them of the filing requirements?

A Most of them are shocked, hurt. Some of them refuse the drugs and in some patients, the schizophrenics, we are reluctant to even advise the drugs because they are suspicious enough to begin with, and they get involved with this and they worsen the condition, and we try to avoid the use of these drugs in those particular patients.

Q With respect to the patients that you actually advised of the filing requirements, can you give us a percentage of the number of patients who refused to take the drug?

A Reluctance, actual refusal, if there is a good doctor-patient relationship, they will end up accepting the drug because the doctor says so.

Q And can you give me an estimate of the number of patients who object to the filing requirements?

A I think all object.

Q Now, you said that in certain cases, you have decided not to use the drugs because of the filing requirements.

A Yes.

Q And what cases are those, mainly?

A Mainly the schizo-affected disorders who are prone to suspicion and to have me act as a putative arm of the Government in a situation like that provokes all kinds of anxiety, even delusions, and if we can avoid the use of drugs in that situation, we try to.

Q And so those are situations where you found the drug was medically indicated but because of the filing requirements you didn't use the drug?

A Yes, sir.

Q Have you ever been requested for particular drugs by addicts?

A Not too often. I have -- most of my patients are referred by other physicians and those, the addicts, are pretty well weeded out and they are easy to spot when they come in anyhow.

Q Has there ever been a situation where an addict has come to your office asking for a drug?

A On occasion, yes.

Q And have you ever prescribed for such a person whom you believed to be an addict?

A Yes, I have prescribed. Yes. They need medication but the trouble is they are taking the wrong medication.

Q Have you prescribed the drug they requested?

A Usually it is the wrong drug.

Q How can you tell whether a person is an addict when he comes to your office?

A Well, they are different types, but usually they come in with the rote story. It is a rote story, a story taken out of a textbook and usually they ask for specific medication which they know by name and dosage and it is always the story that the doctor who has always given him that drug is out of town, or something like that.

Q Doctor, you have made the statement that no ethical physican can live with this law, is that correct?

A Yes, sir.

Q Why did you make that statement?

A I made it at the annual meeting of the State Medical Society in February of 1973.

Q What was the basis for your statement?

A Well, the Commissioner of Health is an extremely fine gentleman and of the highest ethical and moral qualities but he heads a bureaucracy and I am sure working in the bureaucracy means well, but a bureaucracy is a bureaucracy.

In 1966, the Commissioner of Health of New York City notified the doctors of the city that the city law

required that they file the names of drug addicts and also said that the city law provided that these names would be confidential.

I don't know what job I had at that time. I think it was chairman of the State Committee of Mental Health, the State Medical Society, but within a short time I was told that there is a leak someplace. Specifically, a post office employee in Queens was fired from his job two weeks after he was reported.

We looked into the situation and there was no leak at the city level so the leak had to be at the state level. I asked the State Health Department if they would look into it and they were quite shocked and said they would.

Apparently, there was a state law which also demanded that the names of addicts be reported. The state law also said that the names would be kept confidential but there was a provision of the law that stated that these names were to be turned over confidentially to agents of the Federal Drug Enforcement Bureau.

I reported this to the doctors of the city.

Only recently the City Health Department has done sickle cell screening on all of its school children, particularly those who come from Mediterranean areas who

are black, and this will pick up two kinds of children, those who have the disease and those who are carriers.

Now, being a carrier doesn't mean anything. This information is put on the back of the school record where it has no business being, and we raised the dickens about that but these kids who are sickle cell carriers are now having trouble getting jobs and we learned from experience that the only way to safeguard the privacy of our patients is not to let bureaucracy get a hold of their names.

Q Doctor, you mentioned before that there was a certain category of patients, schizophrenic patients for whom you did not prescribe Schedule 2 substances even though they were indicated.

Approximately how many such patients have there been in your practice?

A Anywhere from fifteen to twenty in the last year or two.

MR. LESCH: No further questions.

CROSS-EXAMINATION

BY MR. FOGARTY:

Q Did I understand you to say that the oculogyric crisis occurs in patients who had encephalitis in 1919?

A Yes.

Q How many of those patients do you have?

A One.

Q She testified a little earlier, is that correct? Or is that someone else?

A Yes.

Q Did she testify earlier this morning?

A Yes.

Excuse me. I may have seen two or three others in the clinic.

Q How many patients do you have, total?

A How many patients do I have, total?

Q The total number of patients that you have? How many?

A You mean at the present time or since I started?

Q Right now.

A I am Chief of Service at the Brooklyn Jewish and a consultant at Brooklyn State.

What do you mean by the question, how many patients do I have?

Q How many patients are you treating at the present time?

A In my private office?

Q Let's bring it down to your private office.

A Private office, at the present time I imagine

they run anywhere from twenty to thirty a week. That includes those who come in more than once.

Q And one of them had encephalitis in 1919?

A Encephalitis in 1919 was fairly common. Oculogyric crisis is a very rare neurologic disorder.

Q All right. That is all I wanted on that.

And this patent takes a Schedule 2 drug, right?

A Amphetamines.

Q When you advise the patients about Schedule 2, what exactly do you tell them?

A What the Medical Society lawyer tells us to tell them, that your name --

Q I don't want to know about the Medical Society lawyer.

A I tell them what the Medical Society lawyer told me to tell them.

MR. FOGARTY: Objection. Your Honor, would you ask him to answer the question?

JUDGE FEINBERG: Just answer the question.

A That the name will be entered into a computer in Albany.

Q That's all you tell them?

A That there is a risk that their name may subsequently get out and if they are young children, there

is a risk that their name might be found by the Bar Association, by various state supported institutions. But the law is that the name must be entered into this computer.

Q And you relate these risks to them?

A Yes, sir.

Q And you were told by the counsel for the Medical Society to do that?

A Yes, sir.

Q You were told to relate the risks?

A Pardon?

Q You were told to relate the risks?

A Yes, sir.

Q Do you know anything about the retention period of these prescriptions?

A Since we started our suit, the state has now said it is only five years.

Q Do you tell the patients that?

A Do I tell them that?

Q Yes.

A No, sir.

Q When you treat hyperkinetic children, you write a prescription for them?

A Right.

Q Put their name on it?

A Yes, sir.

Q And if it isn't a Schedule 2 drug, do you put their name on it?

A Yes, sir.

Q Where does the name go?

A It goes in the top of the prescription.

Q And then where, what happens to it?

A The druggist, who is a professional man, has that prescription.

Q Is that available to anybody?

A There are certain people who are permitted by law to have access to such prescriptions.

Q Do you know who they are?

A I think employees of city health departments, State Health Department, Federal drug officials have access to these drugs -- have access to these prescriptions.

Q Does any more information go on the Schedule 2 triplicate prescription than goes on a regular prescription?

A No, sir.

Q Do you know what qualifications the investigators from the State Department of Health have?

A For the record, the State Health Department is

one of the finest in the country. I am sure they are well qualified.

Q Do you know what their qualification is?

A No, sir, I don't.

Q Are you aware that they have to be pharmacists?

A No, sir, I did not know that.

Q You state that no ethical physician can live with this law.

Can you explain why?

A Because you cannot expunge information from a computer, because there is no computer which cannot be gotten into, some with more difficulty than with others and I found out from experience that people mean well but you cannot trust a bureaucracy.

The only way you can keep things confidential is not to let bureaucracy have access to these names.

Q What do you mean by a bureaucracy, Doctor?

A Bureaucracy is a bureaucrat who is employed by a state or city bureau.

Q Only the state and city have bureaucracies, is that correct?

A Federal Government has it, large corporations have it.

Q How about coming down the ladder a little,

Doctor?

A Like where?

Q Let's say the Empire State Physicians Guild?

A We are kind of small compared to --

JUDGE WYATT: Isn't that just an argument, Mr. Fogarty?

MR. FOGARTY: No, it is not.

JUDGE WYATT: You are just arguing with the witness, I suggest.

MR. FOGARTY: I am sorry if you feel that way, your Honor. I will change the line.

Q How did you get into this lawsuit, Doctor?

A How did I get into this lawsuit?

Q Yes.

A You want all the details?

Q Any you care to give us.

JUDGE FEINBERG: What is the relevance of that question?

MR. FOGARTY: The relevance, your Honor, is that I don't think that the real parties in interest have been named in this lawsuit at all.

JUDGE FEINBERG: Have you made any motion along those lines?

MR. FOGARTY: No, we haven't, your Honor. But

we have a statement written by this witness.

JUDGE FEINBERG: If you want to test his credibility on cross-examination, of course you are entitled to do that.

Q Doctor, are you aware of the publication put out by the Empire State Physicians Guild, Incorporated, 11 Eastern Parkway, Brooklyn, New York?

A There were two put out: I wrote them both.

Q Are you the author of the statement, "CIBA has agreed to pick up the bill"?

A Yes, sir.

Q And is that the reason that this lawsuit was brought?

A Are you for real?

JUDGE FEINBERG: Doctor, just answer the questions.

A I'm sorry.

You want me to tell you how this lawsuit came about?

Q I asked you that originally.

A I didn't know I was supposed to answer it. Be glad to.

In 1973, February of 1973, I was a section delegate on psychiatry of the Medical Society of the State

of New York. This was discussed at this section meeting and I was instructed to bring this to the attention of the State Medical Society and to express a vehement opposition to this bill.

At the annual meeting, a meeting was arranged with a legislator responsible for this bill and the counsel to this committee.

After hearing them talk, I thought that we were in a pretty bad situation and at the annual meeting of the State Medical Society, as section delegate of the section on psychiatry, I got up and said that this is a bill with which no ethical physician could live and if the State Society wouldn't bring it into federal court that I would recommend to the Empire State Physicians Guild that we take it into federal court.

Now, it is quite possible that I felt at that time that I was an angry man and, you know, this may be a personal animosity on my part.

So the next place we discussed it, the next Medical Society meeting where this was discussed was at the executive committee of the Kings County Medical Society and it was discussed off the record.

This met the first Wednesday of March and there, too, the unanimous feeling was that this was a bad law and

we were given every encouragement.

I then wrote the Commissioner of Health of the State Health Department and asked if there was any way that this law could be written so that an ethical physician could live with it.

About six or eight weeks later, I received word that this was a legislative matter and I have to talk to the legislator.

In the meanwhile, the Guild got together and we decided to fight the bill and Mr. Perziger was instructed to start action. After Mr. Perziger started action, Professor Arthur Lynch, counsel to the Kings County Medical Society, told me that CIBA Pharmaceutical would like to pick up the tab.

After discussing this with various lawyers and various officers of various societies, we agreed to it but both of us, CIBA and we, said we would do it only if it were made public. It was made public in that announcement.

But the suit was started by, I guess, the section of psychiatry of the Medical Society of the State of New York -- no. They didn't bring the suit. I brought the suit as president of the Empire State Physicians Guild.

Q Do you know what position the State Medical

Society has taken with regard to this law?

A Do I know the position? They vigorously oppose this law and seek its repeal.

Q Is there anything in the court papers about it?

MR. JAFFE: Objection.

JUDGE FEINBERG: Sustained.

Q Did you say that in your affidavit?

A That the State Society was opposed to it?

Q Yes.

A I hold various positions but I have no authority to speak for the State Society.

Q Have you had any cases in which you have found medical indications for the use of a drug on Schedule 2 which you, yourself, have refused to use because it is on Schedule 2?

A Yes, I have one right now.

Q Where you have made the decision?

A Yes.

Q What kind of a case is that?

A She is a schizophrenic lady whom I first saw sixteen years ago. She had a rather serious depression and I put her on Ritalin, gave her shock therapy and she did very well and came back sixteen years later.

The precipitating attack this time seemed to

have been a visit with a sister with whom she had had no contact for many years. She went to visit her sister and found her sister holed up, disheveled, had not eated and there but for the grace of God could she have been and she became seriously depressed and this time I started her on shock therapy but I hated to tell a woman like this about Ritalin and that we would have to report her.

I used alternative drugs and there have been many complaints and I think this week, I am going to have to switch her to Ritalin, whether I like it or not.

Q Did you say there were alternative drugs that could be used?

A I tried them. They are not as good.

Q But this is a patient you have not told about the triplicate prescription?

A This patient? No, not yet.

JUDGE FEINBERG: Any further questions?

MR. JAFFE: No questions, your Honor.

MR. LESCH: No redirect.

JUDGE FEINBERG: Thank you, Doctor.

(Witness excused.)

M A R Y D O E, called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LESCH:

Q Mrs. Does, do you have any children?

A Yes, I do.

Q How many?

A Three.

Q And is one of your children being treated for or have a condition known as hyperkinesis?

A Yes.

Q And how old is that child?

A He will be 9 in January.

Q And was there a time when he received a drug for that condition?

A Yes.

Q And when was that?

A January of 1973.

Q And did there come a time when you learned about the requirements that a prescription containing your son's name for that drug would have to be filed in Albany?

A Yes, I did.

Q When did you learn that?

A I read it in the newspaper. It was sometime in the spring, before the law actually came into effect.

Q Did you then have a conversation with your son's doctor?

A Yes, I did.

Q And what did you say to your son's doctor at that time?

A I told him I didn't like the idea that my son would have to be branded for the rest of his life and that I was going to take him off the prescription, the prescribed drug, and the doctor said to me that I should think twice because he really needed the medication and it would be just like a child on insulin; if he was diabetic, would I take him off the insulin, but it was a very hard decision for me to make.

Q And --

A I tolk him off the drug, even though the doctor advised me not to.

Q What was the immediate effect on your son's conduct after you took him off the drug?

A Well, he has no -- he had no control over himself. He did very poorly in school. He was left back. He lost a full year in school because of his inability to have a long term period of concentration in the classroom.

He was disruptive. He was completely changed.

Q Have you ever permitted him to use this drug again since the law was effective?

A No, I haven't.

MR. LESCH: I have no further questions.

CROSS-EXAMINATION

BY MR. FOGARTY:

Q You used the term "branded for life."

A Yes.

Q What do you mean by that?

A Well, from what I understood with this new drug law that they had, it would have to be on his record and his record, childhood record, would go with him into adulthood and I don't want anyone ever to have the impression that my son was a drug user, for something he had no control over.

Q Who gave you this understanding of the law?

A Myself, from what I read in the newspaper.

Q You just read that in the newspaper?

A Yes.

Q Would it change your opinion if you knew that the records were only maintained for five years?

A Well, as far as I know, anything that is on your school record goes with you for the rest of your life and

you never have any type of privacy. That is something that just stays with you.

Q Does this go with your school record?

A Of course the school would have to be notified that James, my son, was on this drug, because he would have it administered to him by the school nurse.

Q How is he going to have it administered by the school nurse?

A Because it came in capsules and he was to have it so many times throughout the day.

Q And this was even before Schedule 2? This was before this law, wasn't it, that your son started on this drug?

A Yes.

Q So it is on the school record, isn't it?

A Yes.

Q Now, how did this law change anything?

A Because I didn't want him to be anything -- I didn't want him to be involved in any way with the Federal Government or in any way that would hurt him as he reached adulthood.

Q How does this law have anything to do with the Federal Government?

A Well, let's say as he got older, let's say he

wanted to get a, you know, a type of position where he would have to be investigated. This would be on his record, that at one time he was taking drugs for something he had no control over.

Q Yes, but you said it would be on the Federal records.

A Well, maybe I am a little confused as far as to what phase of the government the law is controlled but I didn't want, no matter what phase of the government this is, I don't want my son to have any kind of record at all.

Q What about the prescriptions that you were getting it on before Schedule 2?

A Well, they weren't registered, they didn't have to be registered in triplicate.

Q But they were registered with the state, weren't they?

A Yes.

Q Does it make any difference?

A Yes, it does, now.

Q Explain the difference to us, please.

A At that time, when the prescriptions were -- when I didn't read any such law in the newspaper, from what I understand, the prescription would have been treated as any normal prescription. If somebody has a toothache and they

prescribe a drug to relieve them of pain, that was it.

Now, then when they started the triplicate prescription, it would be something altogether different. My son's name would have been down there and it would have stayed for the rest of his life that at one time or another he was on a drug to help him control his emotions. And I think that is very unfair.

Q Have you heard testimony here this morning as to the length of time that this information is going to be retained?

A Yes, I did. You said five years from what I understand.

Q Is that the rest of his life?

A I don't care if you told me it was two years. I don't want any record of him having taken this drug at all.

Q Isn't there a record in the pharmacist's that he took it?

MR. LESCH: I object. I think he is arguing with the witness.

JUDGE FEINBERG: You did go over that already.

MR. FOGARTY: No further questions, your Honor.

(Witness excused.)

JUDGE FEINBERG: We'll take a short recess.

(Recess)

BEST COPY AVAILABLE

S T A L N E Y I. F I S H M A N, called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LESCH:

Q Dr. Fishman, what is your profession, sir?

A I am a physician.

Q How long have you been a physician?

A Since 1946.

Q Do you specialize in any area of medicine?

A Internal medicine.

Do you have occasion to prescribe drugs that are on Schedule 2?

A Yes, sir.

Q Do you have a practice with respect to advising your patients when they are being prescribed a drug that is on Schedule 2?

A Either the patient or some other responsible member of the family.

Q What advice do you give the patient or the family member?

A I tell them that this is a drug which will cause their name to be entered into a record in Albany and that it will be in a computer record where it will be easily

retrievable by Government investigators.

Q Now, Dr. Fishman, at or about April of 1973, did you have a conversation with respect to one of your patient's names being entered on the computer in Albany?

A Yes, I did.

Q Without giving us the name of the patient, will you tell us what the substance of the conversation was?

JUDGE FEINBERG: Dr. Fishman's name is not on the list of witnesses in the pretrial order.

I assume there is no objection.

MR. FOGARTY: No, your Honor. We were advised of it this morning.

JUDGE FEINBERG: Are there any other changes in the list of witnesses?

MR. LESCH: That is our only change. I believe the intervenors have one.

MS. DICKSTEIN: We are not certain that George Patient will be here but we said tentatively that he would be here.

MR. LESCH: Dr. Fishman was out of town until the Thanksgiving Day holiday so that is the reason he wasn't listed.

A This particular patient is the mother of a physician, a gynecologist, and at the time that I knew the

triplicate prescription law was going to go into effect, I discussed this with the patient's son, the doctor, and told him that we ran the risk of his mother's name being exposed in a governmental record in Albany and that, did he want me to take her off the drug under those circumstances.

He felt that he would like to have his mother's name not appear in any record of the Government in Albany or elsewhere and that, moreover, if she were to find out about this, that he thought it would have an adverse effect on her health which I agreed with.

We then subsequently diminished the drug and stopped it before the law took effect.

Q What was the drug?

A Ritalin.

Q How long had she been on it?

JUDGE CARTER: I want to, before you go further, ask something:

Why, Doctor, do you feel it is necessary to advise your patients in the way that you do, that is, negatively, as you have indicated, that their name will be in Albany and that it is readily retrievable?

THE WITNESS: I feel that most of the people involved with this feel that there is a certain onus attached to having one's name on a special drug list record,

regardless of the good intentions of the Government. It implies --

JUDGE CARTER: But my question is why do you feel that you are required as the doctor to give that kind of information as to the effect of the law to your patients? That's what I want.

THE WITNESS: I think that I would have to inform them about any kind of possible adverse publicity that they might receive as a result of this drug.

Most patients are not aware of the fact that if you prescribe an ordinary drug for them that their name is going to be entered into some special record in a governmental bureau someplace.

BY MR. LESCH:

Q How long had the patient that you have been describing been on Ritalin before the conversation which her son told you that he didn't want her name entered on the computer in Albany?

A About two or three years.

Q Did you observe any effects on the patient after she was no longer taking this drug?

A Yes, I did.

Q What effects did you observe?

A She had an immediate and prompt weight gain. Her

blood pressure went back up to 190 over 110. She became bedridden.

Q Was she, after these symptoms, put back on the drug?

A No.

Q And did she take the drug at any time after the enactment of the law?

A No.

Q Excuse me. After the effective date of the section.

A Beg your pardon?

Q I meant to ask you whether she had taken the drug at any time after the effective date of the statute, which was April 1, 1973.

A No.

Q Do you have any other patients --

A Excuse me. The effective date was April 1, 1973?

Q Yes, sir.

A No. She was off of it by then.

Q Do you have any other patients who were taking Schedule 2 drugs before April 1, 1973, and have not taken them after April 1, 1973, because of the enactment of the statute?

A Yes.

Q Approximately how many such patients do you have?

A Perhaps five, ten.

MR. LESCH: I have no further questions.

CROSS-EXAMINATION

BY MR. FOGARTY:

Q Doctor, what medical societies do you belong to, professional societies?

A The American Medical Association, the Pan American Medical Association, the Medical Society of the State of New York, the American College of Physicians, the American College of Cardiology, the American College of Chest Physicians, the National Medical Veterans Society.

Brooklyn Society of Internal Medican, New York Cardilogical Society. American Thoracic Society, New York Trudeaux Society.

There may be others, sir.

Q Is the Empire State Physicians Guild one of them?

A No, sir.

Q Now, you made a statement that this information is easily retrievable.

A Yes, sir.

Q Where did you get that information?

A I understand that --

Q Where did you get the information that this --

A I understand that the information goes into a computer. I assume it is easily retrievable.

Q You assume that?

A Yes, sir.

Q On what basis do you assume that?

A I have some knowledge of how easy it is to retrieve information from a computer. I think that is general knowledge.

Q Do you have any information as to the computers that are being used by the State Department of Health?

A Information as to what kind of computers the State Department of Health is using?

Q Yes.

A No, sir, I don't.

Q Do you know anything about their system?

A No, sir, I don't.

Q So that it is purely an assumption on your part?

A I think it is common knowledge how quickly one can get information from a computer, sir.

Q How do you get information from a computer, Doctor?

A The person who is in charge of retrieving that information presses a button and it comes out in short order.

Q That's it?

A Yes, sir.

Q And there is nothing more complicated than that?

A That is my experience with airlines, credit cards, any other computer setup.

Q All you do is push buttons?

A Yes, sir.

Q Do you know anything about terminal systems in computers?

A A little bit.

Q Is there any terminal system in the New York State Medical Department?

A New York State Health Department?

Q The Health Department.

A I don't know.

Q Pardon me?

A I don't know.

Q Is it possible to get information out of a computer if it isn't in there?

A Out of a computer if the information is not in the computer?

Q Yes, sir.

A Not as far as I know.

MR. FOGARTY: Thank you. No further questions.

JUDGE FEINBERG: Thank you, Doctor.

(Witness excused.)

MR. LESCH: Dr. Schmierer.

I S R A E L S. S C H M I E R E R, called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LESCH:

Q Doctor, what is your profession?

A I am a physician licensed to practice medicine in the State of New York.

Q How long have you been a physician so licensed?

A Since 1928.

Q Will you give us your educational background, sir?

JUDGE FEINBERG: Will the parties stipulate as to the Doctor's education background?

MR. FOGARTY: I will, your Honor.

MR. LESCH: And also as to his postgraduate training.

JUDGE FEINBERG: I assume you will enter into the record a statement of his education background and the postgraduate training, to which the State will stipulate.

MR. FOGARTY: Yes, sir. We will stipulate to what is in the affidavit that he prepared in the original papers, your Honor, and I think that is more than adequate.

Q What is the Empire State Physicians Guild, Dr. Schmierer?

A It is a socioeconomic group of physicians organized about thirty or thirty-five years ago which will be interested in certain problems confronting the physician, certain problems that the County Medical Society cannot deal with and it is thrown into the lap of the Empire State or the Physicians Guild.

Q Do you hold a position with that organization?

A At the present time I am Chairman of the Board of Governors of the Physicians Guild.

Q What type of socioeconomic problems does it concern itself with?

A Well, we watch legislation in Albany which might be harmful to the physician. We try to watch and prevent people who don't have licenses to practice medicine, keep them from practicing medicine, such as unions, hospitals and so forth.

Q Doctor, in the course of your practice, do you prescribe drugs on Schedule 2?

A Yes, sir.

Q And did you do so prior to April 1, 1973?

A Yes, sir.

Q Have you at my request made a study in order to

determine whether the number of patients for whom you are prescribing Schedule 2 drugs has decreased since the effective date of the law, April 1, 1973?

A Yes, I have.

Q And can you tell us whether there has been a decrease? Has there been such a decrease?

A Yes, sir.

Q Approximately what percentage decrease has there been?

A I went over my records last night and of about sixteen patients to whom I gave Ritalin this year, only about five or six have continued to use it.

JUDGE WYATT: What is Ritalin prescribed for, Doctor?

THE WITNESS: For hyperkinetic children, children who have terrific behavior problems, short attention span, cannot learn, are very difficult to control.

Q And have you ascertained the reason why there has been this decrease from sixteen to six?

A For the simple reason that the patient will note that she is getting a different type of prescription than I ordinarily write and, of course, I do inform her that this is a, what is called a triplicate prescription which must be--a copy of which will be kept in Albany which will be a

permanent copy for a certain length of time.

Q And have those patients who have refused to continue the use of Ritalin indicated the reason why they have so refused?

A Simply -- I shall restate the words that I heard here this morning -- that they do not want any type of permanent record against their children.

Q Is that what the substance of what they have all said to you is?

A Yes, sir.

Q Are any of the children for whom you have prescribed Ritalin addicted to that drug?

A No, sir.

Q Can you tell when a person is an addict?

A Yes, sir.

Q How can you tell that?

A Well, those -- I specialize in pediatrics. I do only pediatrics and when an adolescent, an older adolescent or an adult will walk in my office, he almost admits he is an addict and, of course, I always turn him down, send him away, that I do not treat adults and, of course, they practically admit they are addicts.

MR. LESCH: I have no further questions.

CROSS-EXAMINATION

BY MR. FOGARTY:

Q Doctor, what is your basic objection to the triplicate prescription law?

A The mere fact that the confidentality between myself and the patient is being violated, the mere fact that the patients know this and they are refusing to use a drug which is extremely beneficial to these children and the few patients that have continued admit that they know that there is a record but they say they cannot help it, that they must continue using it.

Q In other words, your basic objection is the placing of the identity of the patient?

A Yes, sir.

Q Doctor, did you prepare an affidavit at the outset of this litigation?

A I probably did. I do not recall at the moment.

Q On the 28th of March 1973?

A I couldn't recall back that far.

Q I show you a copy of an affidavit attached to the original papers served on the Attorney-General.

A That's right. Yes, sir.

Q You read and signed that affidavit, is that correct?

A Yes.

Q And you are still concerned about the confidentiality of your patients, is that correct?

A Yes.

Q Would you tell us why you put the names of two children in that affidavit?

A Well, I didn't make up this affidavit. I certainly did sign it so I think this may have been a faux pas on the part of the people who made this application up.

MR. LESCH: This has already been explained to the Attorney-General's Office, that it was an error at the time that the affidavit was prepared, as to which we are embarrassed.

Q Now, you explain to your patients about the triplicate law.

What do you tell them exactly?

A I inform them that I must issue to them a very special type of prescription. It is not -- doesn't come off the usual prescription pad and, of course, they will question me and I do explain to them that one copy of this will go to Albany and will be a permanent record.

Q You tell them it will be a permanent record?

A I use the word permanent. I didn't qualify that

it would be five years. I said it would be a permanent record.

Q Why don't you qualify it for five years?

A For the simply reason I didn't know exactly at that time how long these records would be kept.

JUDGE WYATT: Is there any dispute between the parties that, as the State has said this morning, the State destroys the records after five years?

MR. JAFFE: Your Honor, as far as I am concerned, there is certainly a dispute because my experience with attempting to reclaim records from such sources as the FBI, finding that I have to file a copy and then finding later that the same records are reproduced, I have my doubts that five years hence that those tapes will be fully destroyed and there is definitely, in that sense, some dispute.

JUDGE WYATT: Tell me, where is the direction to destroy the records after five years?

MR. FOGARTY: It is contained in Section 33 --

JUDGE WYATT: It is in the statute?

MR. FOGARTY: In the statute, your Honor.

JUDGE FEINBERG: An amendment to the statute.

MR. FOGARTY: A1974 amendment to the statute. Section 3370.3 and it states that the Department shall cause to be expunged or otherwise destroyed within five years from

the date of receipt thereof any record of the name of any patient received by it pursuant to the filing requirement.

MR. JAFFE: As the Court --

JUDGE FEINBERG: Excuse me, please.

Mr. Jaffe stated that his problem with that is that he has some doubts whether at the end of the five years that direction will be carried out.

I am not suggesting that it will or will not but do I understand it, following up Judge Wyatt's question, that there is no dispute that the statute as written applies to destroying all records including the material on the computer tapes?

MR. LESCH: That is not quite correct.

The statute, as written, refers to any record received by the State and it is possible that the statute could be interpreted to mean that the triplicate prescription form would be destroyed but the information that is on the computer tape which is not a record that is received by the State from anyone else would not be destroyed.

JUDGE FEINBERG: So you are taking the position that you are not sure that the statute requires the expunging of the names of patients already on the computer tape.

MR. LESCH: Yes, we are taking that position.

JUDGE FEINBERG: I see at this point no need for us to have further legal argument.

MR. LESCH: And I also point out, your Honor, that this statute was passed on June 13, 1974, and I think that it will be conceded by the State that it was as a result of this lawsuit that they passed the statute.

JUDGE FEINBERG: Gentlemen, we have already interrupted Mr. Fogarty's cross-examination.

Do you have an extra copy of the statute and, if so, would you pass it up.

Go ahead, Mr. Fogarty.

MR. FOGARTY: May I have the last question.

(Question read.)

BY MR. FOGARTY:

Q Is it your intention to include that caveat in future instructions?

A Yes, yes.

Q In other words,you will?

A If I am assured by my attorneys that these records will definitely be destroyed at the end of five years.

Q Have you reason to believe they won't?

A I don't know.

Q Now, with regard to changing of your prescription habits, how did you come to that conclusion, Doctor?

JUDGE CARTER: What was the question?

A Sir, I have not changed my prescribing habits at all.

JUDGE WYATT: Excuse me. The Judge wanted to hear the question.

(Question read.)

A I have not changed my prescribing habits. I still prescribe the drugs with the patient's permission. I urge them to permit their children to take this drug.

However, if they have serious objections because of the prescription, there is nothing I can do but hand them a prescription. Whether or not they fill it, I don't know.

Q With a normal prescription blank, do you ever advise your patients that that information is available to the State Department of Health?

A No, I do not.

Q Any reason for that?

A There is a certain maount of confidentiality between the pharmacist and the patient and, as a matter of fact, I read in the papers just one or two days ago that

there is going to be some laws passed not permitted anybody at all to walk into a pharmacy and inspect prescriptions, any prescriptions, unless he is qualified or has a good reason for it.

Q Are you aware of the confidentiality provisions of this law?

A No.

JUDGE WYATT: You mean the law in suit?

MR. FOGARTY: Yes, your Honor.

Q You are not aware of Section 3371 of this law?

A No.

Q Entitled "Confidentiality of Certain Records, Reports and Information"?

A How do I know that the confidentiality will be observed?

Q How do you know that the confidentiality of the patient and the pharmacist will be observed, Doctor?

A I feel I can trust the pharmacist.

Q You can trust the local pharmacist?

A Yes, sir.

Q You can trust State officials?

A I don't know who they are. I am not familiar with them.

Q You don't know any of them?

A No, I don't know any of the State officials.

Q And you presume that they are violating the law constantly?

A I don't presume that at all.

MR. LESCH: Objection.

JUDGE FEINBERG: The witness already answered it and Mr. Fogarty is going to go on to something else.

MR. FOGARTY: Sorry, your Honor. I thought you were talking to me.

No further questions.

MR. JAFFE: I have no questions.

MR. LESCH: No further questions.

JUDGE FEINBERG: Thank you, Doctor.

(Witness excused.)

GEORGE PATIENT, called as a witness by Co-Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JAFFE:

Q Mr. Patient, what is your occupation?

A Unemployed at the present time.

Q And why are you unemployed?

A Disability.

Q What is that disability?

A Cancer of the lung and removal of the ribs.

Q And have you had an operation which relates to that?

A Two.

Q When were those operations?

A The one on the lung was five years this past September and on the ribs three years this coming February.

Q Now, as a result of those operations and this condition, do you or have you taken drugs?

A Yes, sir.

Q And what drug do you principally use?

A Percodan.

Q Did there come a time when you were informed that the way in which Percodan would be prescribed was changing?

A Yes, sir.

Q Your physician told you that, is that correct?

A Yes, sir.

Q And what did your physician tell you?

A I would be on record in Albany as a drug abuser.

Q What was your reaction to that?

A I didn't like it at all.

Q Did you attempt substitute drugs as a result of this?

A Yes, sir.

Q And what drugs were those?

A Tylenol 3; codeine with aspirin.

Q Did those drugs work for you?

A No, sir.

Q In what sense did they not work?

A Well, they never relieved the pain.

Q You have continuing pain without Percodan?

A Yes, sir.

Q And after you attempted to substitute those drugs, and they were unsuccessful, what did you do?

A I didn't hear it, sir.

Q Did you have Percodan prescribed for you after this time?

A Yes, sir.

Q Was it prescribed on triplicate prescription?

A At times it was. By different doctors.

Q How do you presently obtain the drug?

A Through a union form and out of state.

Q In other words, you go out of state to get the drug at this point?

A Yes, sir.

Q Is that a result of this law?

A Yes, sir.

MR. JAFFE: I have no further questions.

CROSS-EXAMINATION

BY MR. FOGARTY:

Q Sir, who told you you were going to be listed as a drug abuser?

A Well, it is a narcotic and I figured --

Q Sir, just a moment, please.

Who told you you were going to be characterized as a drug abuser?

A I don't follow you.

Q You said that you didn't want your name going into a computer as a drug abuser.

A I didn't mention computer at all. I said I just didn't want to be on record.

Q As a drug abuser is what you said.

A That's right.

Q Who said you would be a drug abuser?

A Well, I would be, wouldn't I?

Q Who told you that?

A I don't follow.

MR. JAFFE: His original testimony was that he was told he would be on record. The conclusion, as he indicated, was that he would be on record as a drug abuser and so the question is not exactly apt.

JUDGE WYATT: I understood him to say, and my

recollection may be at fault here, he was told that he would be on record as a drug abuser.

MR. FOGARTY: That is my recollection if it, your Honor.

JUDGE WYATT: And I wonder about it.

MR. JAFFE: I just object to the form of the question, your Honor.

JUDGE FEINBERG: In any event, the witness now knows what the question is.

The question is, who told you that you would be listed as a drug abuser?

THE WITNESS: My doctor.

Q What doctor?

A Dr. Lustig.

Q He used that term? You need this drug for your condition, don't you?

A Yes, sir.

Q And Dr. Lustig prescribes it?

A That's right.

Q And you get it at the pharmacy without any problem?

A Not locally.

Q Do you have problems with the local pharmacy?

A Dr. Lustig does not use the new form.

Q He doesn't use them at all?

A Not to me, he doesn't.

Q Why doesn't he use them with you?

A I don't think he uses them with anybody.

Q Why don't he use them with you?

A I don't know. He hasn't used them --

Q Did you tell him you didn't want them?

A Pardon?

Q Did you tell him not to use them?

A Did I tell him not to use the forms? No, sir.

Q There is no reason why he can't give you a prescription on a triplicate form, is that correct?

A He may have other ideas of it; I don't know.

Q But you are his patient?

A Yes, I am.

Q And you cannot exist without, at least in your own view, you cannot exist without Percodan?

A That's right.

Q But you haven't been told by anybody that you can't get it in the State of New York legally?

A That I what?

Q Nobody has told you that you cannot get Percodan in the State of New York legally?

JUDGE CARTER: Isn't this a waste of time? He has

testified as to why he is going outside of the state.

MR. FOGARTY: No further questions.

MR. JAFFE: I just have one question.

REDIRECT EXAMINATION

BY MR. JAFFE:

Q You did tell Dr. Lustig that you did not wish to be on record in Albany, isn't that right?

A That's correct.

MR. LESCH: And may I have one question.

REDIRECT EXAMINATION

BY MR. LESCH:

Q After you told that to Dr. Lustig, did he then give you the forms which enabled you to get your Percodan in New Jersey?

A That's right. On my union forms. They pay for the medication.

MR. LESCH: Thank you.

JUDGE FEINBERG: Anything else?

RECROSS EXAMINATION

BY MR. FOGARTY:

Q You said union forms. Do you get reimbursement from your insurance company on your prescription?

A If I pay for them, I get them reimbursed.

Q So the insurance company is aware of the Percodan?

MR. JAFFE: Objection. He testified he did not pay for them.

JUDGE FEINBERG: Overruled.

Q Who pays for them?

A The union.

Q Then you tell them that you take Percodan?

A Certainly the know I take Percodan. It is on record.

Q That is a record of it, right? A public record?

MR. LESCH: Objection. I object to the question.

JUDGE FEINBERG: Rephrase it.

Q That is a record of it, correct?

A It goes to a certain plan which the union has. The union pays this plan for the medication that I take.

Now, as far as the union, no, it does not know what medication I take. It is the plan that the union has.

Q You don't tell, you never tell the union what drugs you are taking? They just pay you money, is that the idea?

A Pardon? They knew the operations I went through.

Q Pardon me?

A They knew the operations I went through. They knew what it was for.

Q Your doctor knows, too.

Do they know what drugs you are taking?

A I guess they probably do, because they pay the bill.

MR. FOGARTY: Thank you very much.

JUDGE FEINBERG: Thank you, sir.

(Witness excused.)

JUDGE FEINBERG: Any further witnesses for plaintiffs?

MR. JAFFE: Yes, your Honor. One more witness. In fact, your Honor, I think we have two more witnesses but one is to be after lunch.

G E R A L D L. L U S T I G, called as a witness by the Co-Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JAFFE:

Q Will you state your educational and professional background to the Court?

A Yes. I am a thoracic and cardiovascular surgeon or chest and heart surgeon.

I have by Boards in the American Board of Surgery, The American Board of Thoracic and Cardiovascular Surgery. Member of the American College of Surgeons.

BEST COPY AVAILABLE

I am also a member of many other professional organizations, in addition to which I am president of the Richmond County Medical Society and president of the New York State Federation of Physicians and Dentists and I am vice president of the American Federation of Physicians and Dentists.

Q As a surgeon, do you have occasion to prescribe what are now known as Schedule 2 drugs?

A Very often.

Q And which drugs are those?

A We use Demerol, morphine, codeine, Percodan, Hycodan and drugs of that nature.

Q And how long have you been prescribing drugs of this nature?

A Ever since I graduated from medical school in 1948.

Q And in what connection do you use those drugs?

A Well, chest surgery, first of all, in some of the preoperative orders that we render, we use these drugs and in the postoperative orders for pain and other difficulties of that nature, we prescribe the narcotics.

Q Since April 1973, when this law came into effect, have you been prescribing these drugs?

A I have in the hospital only.

Q And in the hospital you do not fill out what is called a triplicate prescription form, is that correct?

A We do not.

Q And you have not been filling out the triplicate prescription form since 19 -- in your private practice?

A I do not.

Q And why do you not do that?

A In medical school and since that time, the relationship of patient and doctor has been one that's been pretty well described and I feel that personally I cannot abide by the confidentiality factors related to the triplicate prescription law.

Q So you do not prescribe these drugs in private practice?

A I do not.

Q It is true, however, that you prescribe -- there is one exception to this?

A Yes.

Q Namely, George Patient?

A Yes.

Q Now, have there been occasions on which these drugs have been in your private practice medically indicated?

A Yes, frequently.

Q What do you do in those instances?

A Well, first of all, I attempt to use such things as -- interestingly enough, Percodan is part aspirin and Codenone, which is synthetic, and I use aspirin or Tylenol and codeine which is allowed to be prescribed under the BNDD prescription, Federal Narcotic License.

Q In other words, that is a drug as heavy in codeine as codeine is itself?

A Not terribly heavy and neither is Percodan a heavy narcotic drug.

Q And have you found that these substitutes are adequate?

A They have to be or else I refer them to other physicians who have the capability of using stronger medication under the triplicate prescription.

Q How long may you or have you on occasion tried these substitute drugs for?

A The only ones that I prescribe except in --

JUDGE CARTER: I am sorry. I don't understand the question. The last question. The question before that, I mean.

You said you refer them to physicians?

THE WITNESS: I refer them to other physicians who have the capability or who have the triplicate

prescription forms. In principle, I don't use them because I am opposed to the triplicate prescription.

JUDGE CARTER: In other words, you mean you refer them to physicians who are following the law as now prescribed, is that right?

THE WITNESS: Who follow the law with the triplicate prescription, yes, sir.

JUDGE CARTER: That is what I didn't understand.

BY MR. JAFFE:

Q Often you attempt substitutes and if it does not work, you refer them.

How long may this period in which you attempt substitutes go on before the referral period?

A In most postoperative patients, you are able to carry these patients along for a period of time, say two to three weeks. Beyond this period of time, it is quite possible that these patients can get along on such things as empirin and codeine -- I mean empirin, anacin and aspirin, things of this sort.

Once in a while they need a little additive but in general, they phase out and in certain types of operations, as Mr. Patient had, where ribs are removed, they have arthritic changes which involve the nerves between the ribs and this is called intercavital neuralgia where the

pain associated with the nerves between the ribs being pinched or arthritic changes taking place.

In those situations, it is very difficult to control this in general.

Now, Mr. Patient has had good relief with Percodan. Occasionally he gets a cough, which requires Hycodan, another drug that is on the Schedule 2, but in the meantime, he is not, in his own way, able to get along with the empirin and codeine or Tylenol and codeine.

Q In other words, as a result of the practice of substitution, a patient may undergo pain for a period of time, attempting to find substitutes, is that correct?

A Yes.

Q And this in your case results from your feeling that the law has changed the structure of confidentiality?

A I feel that way.

Q Have you run into other physicians throughout the state who have felt the same way?

A I travel throughout the country and the state speaking to various doctor's groups and medical societies by nature of my position and I have found that anywhere from ten, fifteen, sometimes twenty or thirty percent of doctors do object; sometimes they don't have the background for their objection, but many of them are very firmly

convinced as I am and as when most of us have been trained, that confidentiality is a very important factor between a patient and his physician.

Q And I take it that both in your practice and in theirs, they have changed their medical practice as a result of this law?

A There are about, anywhere from ten to fifteen or twenty percent of doctors in various areas who do not use that triplicate prescription. I know that to be true on Staten Island.

MR. JAFFE: No further questions.

CROSS-EXAMINATION

BY MR. FOGARTY:

Q Doctor, when you use substitutes for the Schedule 2 drugs, is it safe to assume that there is no medical impairment or danger to the patient?

A I would never endanger the patient under any circumstances, so, of course, that would be true.

Q I didn't think you would.

A That would be true.

Q So that in a lot of these cases, they probably can get by on something else?

A I have stated that.

Q Did you hear your patient testify that you have

him prescriptions to be filled somewhere else?

A He by accident found out that his union prescriptions, as such, can be filled out of state. He sometimes goes to Florida or he has gone to Michigan and he has gone to Jersey and found out that his union -- I do not maintain those forms -- he has the forms and he has them filled on those forms.

Q In other words, you don't --

A I do not maintain those forms.

Q And you don't --

A The only forms I maintain are the customary Prescription pads that we have had for many years.

Q And you do not prescribe Schedule 2 drugs?

A No, sir.

MR. FOGARTY: Thank you very much, Doctor.

JUDGE FEINBERG: Thank you, Doctor.

(Witness excused.)

JUDGE FEINBERG: Next witness.

MR. JAFFE: Your Honor, we had one witness for, to be frank, two o'clock, inasmuch as we didn't think we would be through with all of these witnesses.

JUDGE FEINBERG: Who is that?

MR. JAFFE: Another pediatrician who will testify that he has had a drop in the --

JUDGE FEINBERG: Would you give the name?

MR. JAFFE: Dr. David Kane.

JUDGE FEINBERG: That is your one remaining witness?

MR. LESCH: We have one witness also.

MR. JAFFE: That is my remaining witness.

MR. LESCH: Our witness is Mr. Robert Roe, who is a school teacher, who said that he would get here about three o'clock.

MR. FEINBERG: How about the defendant's witnesses? Are they here?

MR. FOGARTY: The are taken on deposition, your Honor.

JUDGE FEINBERG: Is Dr. Kane going to give any information other than what we have already had from four doctors?

MR. JAFFE: I would say fundamentally not different, your Honor, to be frank.

JUDGE FEINBERG: How about Mr. Roe?

MR. LESCH: Well, your Honor, perhaps we can do it by stipulation. I don't think the State would --

JUDGE FEINBERG: Can't you stipulate that if Mr. Roe came to testify, he would testify in the following manner -- and read it into the record? What would Mr. Roe

testify to?

MR. LESCH: That he is the father of a nine-year old boy, that his son's condition was diagnosed approximately three years ago, that he has been treated by a doctor who has prescribed Ritalin, that he has a 145 I.Q., that prior to his treatment with Ritalin, he was performing well below grade level, that since Ritalin has been prescribed, the boy has been performing at or above his grade level, that when he first learned about the triplicate prescription requirements that he objected to the filing of the prescriptions, but that he was advised by the doctor that it was necessary for his son's continued well being and that he objected strenuously to the filing requirement but because it was necessary for his son's well being, he hasn't taken his son off and that his son is now receiving Ritalin, that prescriptions covering his son's prescription are filed in Albany and that he continues to object to this procedure.

JUDGE FEINBERG: Would you say that it is a fair characterization that that testimony would be fairly similar to some of the other testimony that we have had?

MR. LESCH: Yes.

JUDGE FEINBERG: Other witnesses for plaintiff?

MR. LESCH: Yes, I would.

JUDGE FEINBERG: And Mr. Fogerty, would you be willing to stipulate that if Mr. Roe were so called that that is what he would testify to?

MR. FOGARTY: With the one caveat, your Honor, that on cross-examination he would admit that the school records contain his child's condition.

MR. LESCH: I don't know that to be a fact.

MR. FOGARTY: Well, I am the father of five and I know they are there.

JUDGE FEINBERG: Well, gentlemen --

MR. FOGARTY: Off the record, your Honor. I get a blank every September that asks me all the conditions of my children and I have to give it to them; that's all. That is the public schools.

JUDGE FEINBERG: Gentlemen, do you want to accept that testimony by stipulation of Mr. Roe, that that is what he would testify to and that he would be cross-examined along those lines, without any stipulation as to what he would admit? That's how he would be cross-examined.

MR. FOGARTY: All right. That is all right.

MR. JAFFE: I would like to say on the documents --

MR. LESCH: That is agreeable to us.

MR. JAFFE: That is agreeable to us.

On the Doctor's testimony, your Honor, he would

testify that there are children who have been off the drug as a result of this law for a period of time and it has a detrimental effect on their schooling and that he has dealt with particular cases of that sort and it has hurt the children as a result of the parents feeling that the law had changed the nature of the prescribing process and the record would hurt their children.

JUDGE FEINBERG: Would you regard that testimony as essentially cumulative to what we already have of the four doctors?

MR. JAFFE: Your Honor, I think the question would be better put, does the Court consider it cumulative. I am not sure I am the final arbitrator here.

JUDGE FEINBERG: I don't want to exclude the testimony unless we have this. Could we have a stipulation that that is what the doctor would testify to?

MR. FOGARTY: I would stipulate that it would be cumulative. We have heard it before.

JUDGE FEINBERG: Do you have any objection to the statement for the record that that is what he would testify to and we would take it that wya or do you want the opportunity to cross-examine?

MR. FOGARTY: No. I would stipulate that the cross-examination would be the same as earlier witnesses.

JUDGE FEINBERG: Then the taking of evidence by live witnesses is closes, gentlemen, is that correct? And the deposition testimony has to be submitted to us.

MR. FOGARTY: That's right.

JUDGE FEINBERG: But the taking of evidence by this Court, of live witnesses, is closed.

MR. LESCH: Yes, your Honor.

MR. FOGARTY: Yes, your Honor.

(Discussion off the record.)

JUDGE FEINBERG: The hearing, then, is closed and we will await whatever further has to be submitted to us and thank you very much.

(Court adjourned.)

Deposition of Dr. Joseph Martin Rosenberg.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

RICHARD ROE, an infant, by ROBERT ROE, his parent, JOHN DOE, an infant, by MARY DOE, his parent, JAMES MOE, an infant, by MICHAEL MOE, his parent, JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

-and-

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Additional Plaintiffs,

-against-

HOLLIS S. INGRAHAM as Commissioner of Health of the State of New York,

Defendant.

INDEX NO.
73 CIV 1303
(RLE-3 Judge Court)

- x

Deposition of DR. JOSEPH MARTIN ROSENBERG, a witness, taken by plaintiffs pursuant to order, at the offices of Messrs. Shea, Gould, Climenko & Kramer, 330 Madison Avenue, New York, N. Y. 10017, on December 4, 1974, at 10:00 a.m., before William Blitz, a Certified Shorthand Reporter and Notary Public of the State of New York.

BEST COPY AVAILABLE

APPEARANCES:

Messrs. SHEA, GOULD, CLIMENKO & KRAMER,
Attorneys for plaintiffs,
330 Madison Avenue,
New York, N. Y. 10017
BY: MICHAEL LESCH, ESQ.,
JOHN PREEFER, ESQ., Of Counsel
-and-
SOLOMON Z. FERZIGER, ESQ.,
1345 Avenue of the Americas,
New York, N. Y. 10019

LOUIS J. LEFKOWITZ,
Attorney General,
State of New York,
2 World Trade Center,
New York, N. Y. 10047
BY: MICHAEL P. FOGARTY, ESQ.,
A. SETH GREENWALD, ESQ.,
Assistant Attorney Generals

Messrs. NORWICK, RAGGIO & JAFFE,
Attorneys for additional plaintiffs,
2 Pennsylvania Plaza,
New York, N. Y. 10001
BY: MILES JAFFE, ESQ.,
Of Counsel

ALSO PRESENT:

AMBROSE P. DONOVAN, JR., ESQ.

JOSEPH BONACCI

JOSEPH L. CANNIZZARO

oOo

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties herein, that the sealing, filing and certification of the within deposition be waived; that such deposition may be signed and sworn to before any

officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the officer before whom said deposition is taken.

oOo

MR. LESCH: I ask that there be marked Sample Triplicate Prescription Form (Deposition Exhibit 23) as Plaintiffs' Trial Exhibit 1 for identification.

(Sample Triplicate Prescription Form (Deposition Exhibit 23), marked Plaintiffs' Trial Exhibit 1 for identification as of this date.)

MR. LESCH: I ask that there be marked a chart entitled "Phase II: Practitioner Rx Work Flow Chart" (Deposition Exhibit 1) as Plaintiffs' Trial Exhibit 2 for identification.

(Chart entitled "Phase II: Practitioner Rx Work Flow Chart" (Deposition Exhibit 1), marked Plaintiffs' Trial Exhibit 2 for identification as of this date.)

MR. LESCH: I ask that there

be marked the same document as Exhibit 2, with additional material (Deposition Exhibit 17) as Plaintiffs' Trial Exhibit 2A for identification.

(Same document as Exhibit 2, with additional material (Deposition Exhibit 17), marked Plaintiffs' Trial Exhibit 2A for identification as of this date.)

MR. LESCH: I ask that there be marked a document entitled "Phase II: Practitioner Rx Nacro Flow Chart B" dated 8/7/73 (Deposition Exhibit 3) as Plaintiffs' Trial Exhibit 3 for identification.

(Document entitled "Phase II: Practitioner Rx Nacro Flow Chart B" dated 8/7/73 (Deposition Exhibit 3), marked Plaintiffs' Trial Exhibit 3 for identification as of this date.)

MR. LESCH: I ask that there be marked the same document as Exhibit 3, but dated 11/29/73 and containing additional material (Deposition Exhibit 18), as Plaintiffs' Trial Exhibit 3A for identification.

(Same document as Exhibit 3, but dated 11/29/73 and containing additional material (Deposition Exhibit 18), marked Plaintiffs' Trial Exhibit 3A for identification as of this date.)

MR. LESCH: I ask that there

be marked a document entitled "Schedule II Controlled Substances System, Draft 9/14/73 Phase II: System Update - Filled Prescription-Practitioners (Phase II Practitioner/Rx Work Flow Chart)" (Deposition Exhibit 3) as Plaintiffs' Trial Exhibit 4 for identification.

(Document entitled "Schedule II Controlled Substances System, Draft 9/14/73 Phase II: System Update - Filled Prescription-Practitioners (Phase II Practitioner/Rx Work Flow Chart)" (Deposition Exhibit 3), marked Plaintiffs' Trial Exhibit 4 for identification as of this date.)

MR. LESCH: I ask that there be marked a document entitled "Reported Missing Practitioner Rx's Which Have Been Filled" (Deposition Exhibit 4, 11) as Plaintiffs' Trial Exhibit 5 for identification.

(Document entitled "Reported Missing Practitioner Rx's Which Have Been Filled" (Deposition Exhibit 4, 11), marked Plaintiffs' Trial Exhibit 5 for identification as of this date.)

MR. LESCH: I ask that there be marked a document entitled "Practitioner Prescription Criteria Deviations" (Deposition Exhibit 4A, 11A) as Plaintiffs' Trial Exhibit 6 for identification.

(Document entitled "Practitioner Prescription Criteria Deviations" (Deposition Exhibit 4A, 11A), marked Plaintiffs' Trial Exhibit 6 for identification as of this date.)

MR. LESCH: I ask that there be marked a document entitled "Practitioner Rx Transaction Record Edit Error Listing (Asterisk Indicates Error)" (Deposition Exhibit 4B, 11B) as Plaintiffs' Trial Exhibit 7 for identification.

(Document entitled "Practitioner Rx Transaction Record Edit Error Listing (Asterisk Indicates Error)" (Deposition Exhibit 4B, 11B), marked Plaintiffs' Trial Exhibit 7 for identification as of this date.)

MR. LESCH: I ask that there be marked a document entitled "Procedure for Daily Editing of Triplicate Prescriptions" (Deposition Exhibit 5) as Plaintiffs' Trial Exhibit 8 for identification.

(Document entitled "Procedure for Daily Editing of Triplicate Prescriptions" (Deposition Exhibit 5), marked Plaintiffs' Trial Exhibit 8 for identification as of this date.)

MR. LESCH: I ask that there be marked a document entitled "Identification

Division, Program-ID. 'H66034'" (Deposition Exhibit 6) as Plaintiffs' Trial Exhibit 9 for identification.

(Document entitled "Identification Division, Program-ID. 'H66034'" (Deposition Exhibit 6), marked Plaintiffs' Trial Exhibit 9 for identification as of this date.)

MR. LESCH: I ask that there be marked a Xerox copy of a handwritten document showing printouts to be prepared monthly (Deposition Exhibit 8) as Plaintiffs' Exhibit 10 for identification.

(Xerox copy of a handwritten document showing printouts to be prepared monthly (Deposition Exhibit 8), marked Plaintiffs' Trial Exhibit 10 for identification as of this date.)

MR. LESCH: I ask that there be marked a document entitled "Schedule II Controlled Substances System, Phase II: System Update - Filled Prescription-Practitioners (Phase II Practitioner/Rx Work Flow Chart)" with attachments (Deposition Exhibit 10) as Plaintiffs' Trial Exhibit 11 for identification.

(Document entitled "Schedule II Controlled Substances System,

Phase II: System Update - Filled Prescription-Practitioners (Phase II Practitioner/Rx Work Flow Chart)" with attachments (Deposition Exhibit 10), marked Plaintiffs' Trial Exhibit 11 for identification as of this date.)

MR. LESCH: I ask that there be marked a live of five computer programs using data from the filled prescriptions (Gottheim 58) as Plaintiffs' Trial Exhibit 12 for identification.

(List of five computer programs using data from the filled prescriptions (Gottheim 58), marked Plaintiffs' Trial Exhibit 12 for identification as of this date.)

MR. LESCH: I ask that there be marked Program No. 1 as Plaintiffs' Trial Exhibit 12A for identification.

(Program No. 1, marked Plaintiffs' Trial Exhibit 12A for identification as of this date.)

MR. LESCH: I ask that there be marked Program No. 2 as Plaintiffs' Trial Exhibit 12B for identification.

(Program No. 2, marked Plaintiffs' Trial Exhibit 12B for identification as of this date.)

MR. LESCH: I ask that there be marked Program No. 3 as Plaintiffs' Trial

Exhibit 12C for identification.

(Program No. 3, marked Plaintiffs' Trial Exhibit 12C for identification as of this date.)

MR. LESCH: I ask that there be marked Program No. 4 as Plaintiffs' Trial Exhibit 12D for identification.

(Program No. 4, marked Plaintiffs' Trial Exhibit 12D for identification as of this date.)

MR. LESCH: I ask that there be marked Program No. 5 as Plaintiffs' Trial Exhibit 12E for identification.

(Program No. 5, marked Plaintiffs' Trial Exhibit 12E for identification as of this date.)

MR. LESCH: I ask that there be marked a printout entitled "Practitioner Rx Transaction Record Edit Error Listing" (Cannizzaro 83-86) as Plaintiffs' Trial Exhibit 13 for identification.

(Printout entitled "Practitioner Rx Transaction Record Edit Error Listing" (Cannizzaro 83-86), marked Plaintiffs' Trial Exhibit 13 for identification as of this date.)

MR. LESCH: I ask that there be marked a printout entitled "Schedule II Substances Dispensed and Processed in Month

of February" (Cannizzaro 83-86) as Plaintiffs' Trial Exhibit 14 for identification.

(Printout entitled "Schedule II Substances Dispensed and Processed in Month of February" (Cannizzaro 83-86), marked Plaintiffs' Trial Exhibit 14 for identification as of this date.)

MR. LESCH: I ask that there be marked a printout entitled "All Prescriptions Processed in Month of February" (Cannizzaro 83-86) as Plaintiffs' Trial Exhibit 15 for identification.

(Printout entitled "All Prescriptions Processed in Month of February" (Cannizzaro 83-86), marked Plaintiffs' Trial Exhibit 15 for identification as of this date.)

MR. LESCH: I ask that there be marked a printout entitled "Report of Duplicate Prescriptions Processed in Month of February" (Cannizzaro 83-86) as Plaintiffs' Trial Exhibit 16 for identification.

(Printout entitled "Report of Duplicate Prescriptions Processed in Month of February" (Cannizzaro 83-86), marked Plaintiffs' Trial Exhibit 16 for identification as of this date.)

MR. LESCH: I ask that there be marked a printout entitled "Unmatched

BNDD Numbers" (Cannizzaro 83-86)as Plaintiffs' Trial Exhibit 17 for identification.

(Printout entitled "Unmatched BNDD Numbers" (Cannizzaro 83-86), marked Plaintiffs' Trial Exhibit 17 for identification as of this date.)

MR. LESCH: I ask that there be marked a printout entitled "Patients With Rx Total Dose In Excess 30 Day Supply In Month of February" (Cannizzaro 83-86) as Plaintiffs' Trial Exhibit 18 for identification.

(Printout entitled "Patients With Rx Total Dose In Excess 30 Day Supply In Month of February" (Cannizzaro 83-86), marked Plaintiffs' Trial Exhibit 18 for identification as of this date.)

MR. LESCH: I ask that there be marked a printout entitled "Alphabetic Listing of Practitioner Master File" (Cannizzaro 83-86) as Plaintiffs' Trial Exhibit 19 for identification.

(Printout entitled "Alphabetic Listing of Practitioner Master File" (Cannizzaro 83-86), marked Plaintiffs' Trial Exhibit 19 for identification as of this date.)

MR. LESCH: I ask that there be marked a printout entitled "New York State Department of Health Physicians List By Name"

(Cannizzaro 83-86) as Plaintiffs' Trial Exhibit 20 for identification.

(Printout entitled "New York State Department of Health Physicians List By Name" (Cannizzaro 83-86), marked Plaintiffs' Trial Exhibit 20 for identification as of this date.)

MR. LESCH: I ask that there be marked a printout entitled "New York State Department of Health Master Mailing File" (Cannizzaro 83-86)as Plaintiffs' Trial Exhibit 21 for identification.

(Printout entitled "New York State Department of Health Master Mailing File" (Cannizzaro 83-86), marked Plaintiffs' Trial Exhibit 21 for identification as of this date.)

MR. LESCH: I ask that there be marked a letter to New York doctors from Commissioner Ingraham dated November 28, 1973 and attachment thereto (Baker 239) as Plaintiffs' Trial Exhibit 22 for identification.

(Letter to New York doctors from Commissioner Ingraham dated November 28, 1973 and attachment thereto (Baker 239), marked Plaintiffs' Trial Exhibit 22 for identification as of this date.)

MR. LESCH: I ask that there be marked a memorandum from Mr. Bellizzi to

Commissioner Whalen dated June 20, 1973 (Attachment 5 with letter dated July 12, 1974 from A. Seth Greenwald, Esq. to Michael Lesch, Esq.) as Plaintiffs' Trial Exhibit 23 for identification.

(Memorandum from Mr. Bellizzi to Commissioner Whalen dated June 20, 1973 (Attachment 5 with letter dated July 12, 1974 from A. Seth Greenwald, Esq. to Michael Lesch, Esq.), marked Plaintiffs' Trial Exhibit 23 for identification as of this date.)

MR. LESCH: I ask that there be marked a memorandum to Doctor Baker from Mr. McDermott dated October 11, 1973 (Deposition Exhibit 13) as Plaintiffs' Trial Exhibit 24 for identification.

(Memorandum to Doctor Baker from Mr. McDermott dated October 11, 1973 (Deposition Exhibit 13), marked Plaintiffs' Trial Exhibit 24 for identification as of this date.)

MR. LESCH: I ask that there be marked a memorandum to Doctor Baker from Mr. McDermott dated October 23, 1973 (Deposition Exhibit 9) as Plaintiffs' Trial Exhibit 25 for identification.

(Memorandum to Doctor Baker from Mr. McDermott dated October 23,

1973 (Deposition Exhibit 9), marked Plaintiffs' Trial Exhibit 25 for identification as of this date.)

MR. LESCH: I ask that there be marked an unsigned memorandum, dated June 12, 1974. Subject: Investigations going to more than one Doctor (1974) (Bellizzi 70) as Plaintiffs' Trial Exhibit 26 for identification.

(Unsigned memorandum, dated June 12, 1974. Subject: Investigations going to more than one Doctor (1974) (Bellizzi 70), marked Plaintiffs' Trial Exhibit 26 for identification as of this date.)

MR. LESCH: I ask that there be marked an unsigned memorandum, dated May 12, 1974. Subject: Case Reports of violations of going to more than one doctor, Cases Reported (1969-1974) (Bellizzi 45-46) as Plaintiffs' Trial Exhibit 27 for identification.

(Unsigned memorandum, dated May 12, 1974. Subject: Case Reports of violations of going to more than one doctor, Cases Reported (1969-1974) (Bellizzi 45-46), marked Plaintiffs' Trial Exhibit 27 for identification as of this date.)

MR. LESCH: I ask that there be marked a N. Y. State Department of Health Flier entitled "How the Controlled Substances

Act Affects Medical Practitioners in New York State" (Deposition Exhibit 21) as Plaintiffs' Trial Exhibit 28 for identification.

(N. Y. State Department of Health Flier entitled "How the Controlled Substances Act Affects Medical Practitioners in New York State" (Deposition Exhibit 21), marked Plaintiffs' Trial Exhibit 28 for identification as of this date.)

MR. LESCH: I ask that there be marked an audit report on Financial and Operating Practices, New York State Identification and Intelligence System, Report No. AL-ST-29-71 as Plaintiffs' Trial Exhibit 29 for identification.

(Audit Report on Financial and Operating Practices, New York State Identification and Intelligence System, Report No. AL-ST-29-71, marked Plaintiffs' Trial Exhibit 29 for identification as of this date.)

MR. LESCH: I ask that there be marked a stipulation among the Attorneys for the parties "So Ordered" on July 2, 1974 as Plaintiffs' Trial Exhibit 30 for identification.

(Stipulation among the Attorneys for the parties "So Ordered" on July 2, 1974, marked Plaintiffs' Trial Exhibit 30 for identification as of this date.)

MR. LESCH: I ask that there be marked a reporting of Sales of Dangerous Drugs, Second Interim Report of the Temporary State Commission to Evaluate the Drug Laws (Albany, N. Y. April 5, 1971) as Plaintiffs' Trial Exhibit 31 for identification.

(Reporting of Sales of Dangerous Drugs, Second Interim Report of the Temporary State Commission to Evaluate the Drug Laws (Albany, N. Y. April 5, 1971), marked Plaintiffs' Trial Exhibit 31 for identification as of this date.)

MR. LESCH: I ask that there be marked Proposed New York State Controlled Substances Act and Revision of the Penal Law, Interim Report of the Temporary State Commission to Evaluate the Drug Laws (State of New York - (1972) Legislative Document No. 10) as Plaintiffs' Trial Exhibit 32 for identification.

(Proposed New York State Controlled Substances Act and Revision of the Penal Law, Interim Report of the Temporary State Commission to Evaluate the Drug Laws (State of New York - (1972) Legislative Document No. 10), marked Plaintiffs' Trial Exhibit 32 for identification as of this date.)

MR. LESCH: I ask that there be marked a memorandum of Chester R. Hardt,

Chairman of the Temporary State Commission to Evaluate the Drug Laws (Appendix to Court of Appeals, pp. 40a-44a) as Plaintiffs' Trial Exhibit 33 for identification.

(Memorandum of Chester R. Hardt, Chairman of the Temporary State Commission to Evaluate the Drug Laws (Appendix to Court of Appeals, pp. 40a-44a), marked Plaintiffs' Trial Exhibit 33 for identification as of this date.)

MR. LESCH: I ask that there be marked plaintiffs' first set of interrogatories as Plaintiffs' Trial Exhibit 34 for identification.

(Plaintiffs' first set of interrogatories, marked Plaintiffs' Trial Exhibit 34 for identification as of this date.)

MR. LESCH: I ask that there be marked plaintiffs' second set of interrogatories as Plaintiffs' Trial Exhibit 35 for identification.

(Plaintiffs' second set of interrogatories, marked Plaintiffs' Trial Exhibit 35 for identification as of this date.)

MR. LESCH: I ask that there be marked defendant's responses to plaintiffs' interrogatories as Plaintiffs' Trial Exhibit 36

for identification.

(Defendant's responses to plaintiffs' interrogatories, marked Plaintiffs' Trial Exhibit 36 for identification as of this date.)

MR. LESCH: Let the record reflect that this deposition is being held pursuant to pretrial order No. 2 on consent made by Judge Carter on November 21, 1974, and in view of the fact that this is in lieu of trial, rather than an ordinary deposition, I am requesting that defendant's attorneys make all objections and reserve no objections for any future time.

In addition, I think the record should reflect that during the course of the trial before the three judge court on Monday, I made available to Mr. Greenwald a list of the actual names of the plaintiffs herein and their addresses.

Now unless anyone wants to say anything, I would like to commence the examination of Dr. Rosenberg.

MR. JAFFE: I would just like to add the one statement that I supplied the names of the co-plaintiff to Mr. Greenwald.

D R. J O S E P H M A R T I N R O S E N B E R G, called as a witness by the plaintiffs, being first duly sworn by the Notary Public (William Blitz), testified as follows:

EXAMINATION BY MR. LESCH:

Q Dr. Rosenberg, will you describe your background and qualifications?

A My name is Jerry M. Rosenberg and I'm presently head of the Department of Management and Professor of Management at Polytechnic Institute of New York in New York City.

Prior to that, I was from 1961 to 1964 an assistant professor of Psychology and Organizational Behavior at Cornell University.

From 1964 to 1968, I was an assistant professor at Columbia University, Teachers College.

From 1968 to 1971, I was in private practice.

From 1971 until this past summer, I was an associate professor at Baruch College, City University of New York and teaching in the Department of Psychology.

Q What is your formal education, sir?

A I received a Bachelor of Science from the

City College of New York, with a major in Psychology in 1956.

Master's degree was awarded in 1957 from Ohio State University in Psychology.

As a recipient of a Fulbright and French Government Award, I attended in 1958 the Sorbonne University of Paris at the Center of Higher Studies for which I was awarded a certificate, and completed my Ph.D. 1962 at New York University.

Q Have you written any books or articles in the area of privacy?

A Yes, I have.

I've written a book which was published in 1969 by Random House with the title, "The Death of Privacy, Do Government and Industrial Computers Threaten Our Personal Freedon?"

The book, by the way, was selected by The New York Times as one of the best books of interest in the year 1969, one of the 22 best books of the year, and following that there have been numerous occasions speaking across the country before industrial groups, colleges, lectures, writings, etc.

Febraury, 1971, I was called upon by Senator Irvin to testify on opening day at Constitutional

Rights Subcommittee hearing on federal data banks, privacy and the Bill of Rights. I did testify. The results were printed in the U. S. Congressional Record, and also appeared in the federal publication of the senate hearings.

I might just add that I continue to be active in the field, research and writing on the subject.

Q Dr. Rosenberg, would you describe your other writings in the areas of computers and privacy?

A I've had two other books which were published also in the year 1969, a book called "The Computer Prophets" published by Macmillan, which dealt with the historical evolution of the computer. Inserts within that book deal with the issue of privacy also.

Another book on -- called "Automation, Manpower and Education" published 1967 by Random House dealt with many of the technological aspects, change, and issues of submission of man. Some of the psychological concerns are also part of that.

Some of the articles on privacy without giving specific titles, since I don't have them in front of me --

Q May I show this to you to refresh your recollection.

A A paper 1962 which was a position paper

prepared for the Union of American Hebrew Congregations convention in Los Angeles titled "Surveillance and Privacy."

MR. FOGARTY: May we have an identification of what he is reading from.

MR. LESCH: Sure.

Dr. Rosenberg is reading from a list of his publications which he previously provided me.

THE WITNESS: 1971, a speech given at Wesleyan College in Macon, Georgia titled "The College Student and Freedom."

1971, March 24th, "Students Rights" a paper delivered at North Dakota State University in Fargo, North Dakota.

The 25th of March, 1971, "The Death of Privacy" a paper presented at the College of St. Mary, Omaha, Nebraska.

May 19, 1971, convocation address at the State University of New York at Oswego, New York titled "The Right of All Men to Privacy."

A paper delivered on August 19, 1971 before The Council of State Governments

National Convention in Minneapolis, Minnesota titled "The Government's Responsibility to Protect the People's Right to Privacy."

November 9, 1971 before the Canadian Information Processing Society in Toronto entitled "The Threat to Individual Freedom."

February 9, 1972, LaSell Junior College in Auburndale, Massachusetts, "Student's Rights on a Changing Campus," the topic of the paper.

April 13, 1972, High Point College in High Point, North Carolina, a paper presented entitled "Campus Surveillance."

May 8, 1972 at Muskingum College in New Concord, Ohio, "The Right of All Men to Privacy."

May 25, 1972, at Southern Illinois University, Carbondale, Illinois, delivery of the convocation address entitled "The Age of Aquarius versus The Age of Aquariums."

September 28, 1972 at Plymouth State College, Plymouth, New Hampshire, entitled

"Student's Rights and Psychological Submission."

And a presentation on November 6, 1973 at St. Lawrence University in Canton, New York entitled "Watergate - Implications for Student's Rights."

BY MR. LESCH:

Q Are you familiar with Article 33 of the Public Health Law of New York?

A Yes, I am.

Q Have you at my request made a study of the behavior or psychological affects of the accumulation of the personal data called for by Article 33 on the privacy of the individuals affected?

A Yes, I have.

Q What are the psychological or behavioral affects of the filing requirements of Article 33 of the New York Public Health Laws and particularly those provisions requiring the filing of copies of prescriptions for Schedule II drugs?

A I understand that each month approximately 100,000 records are stored in Albany relating to triplicate forms of users of Schedule II drugs, and I claim that within this 100,000 population certainly a sizeable percentage will have some chilling affect or psychologi-

cal impact resulting from the documentation data.

Q Can you be more specific and give us the areas of psychological or behavioralreactions that will occur when there is an awareness of an individual that his personal data is being recorded?

A I think there are a number of very important areas. Just to identify them, I think it could lead to conformity by the individual, it can lead to withdrawal, loss of autonomy, failure to express truthful statements, decline in productivity, a cold personality, "cold personality" may evolve, physical symptoms may appear, and others.

Q Sir, what do you mean when you say that a pattern of conformity may develop?

A I start off first by saying to some extent everyone conforms, every human being conforms to the pressures from the outside.

In this particular case, I think that people who have some reason to be captious or are fearful of reprisal will tend to adjust their behavior and thinking to what they believe is corrected or anticipated behavior.

Let me give you an example here.

I think people who are outspoken, when

they feel that there is a record kept on them in some agency, particular government agency, because of fear of reprisal, they may not feel free or willing to express openly their feeling of antagonism, mistrust or just general attitude toward government, as I said, because of some fear that it may affect them in the long range because of it being documented and misused by the agency. The same would apply in an industrial setting, too.

Once there is a knowledge that information is recorded, for some people it will have a psychological caution, a button will be pressed to be a little more careful as to what you are saying.

Q Dr. Rosenberg, in the area of the filing of triplicate prescriptions, would the knowledge by an individual that prescriptions containing his name and the drug that he is taking have an affect on that individual's behavior with respect to taking the drug?

A May very well.

Q What type of affect would it have?

A As in the previous example, knowing that information is being recorded, that may raise a number of questions within the individual. How is it used, how is it misused, who has access to it.

Even statements saying that it will be

destroyed, a person may question whether there is truth behind that statement. And so again the conformity issue is raised out of fear.

Q Is there a likelihood that such persons will tend not to use the drug as was the case, for example, with Mrs. Poe, I believe, one of the witnesses who testified in this case on Monday?

A Yes.

Q You also mentioned a pattern of withdrawal, Dr. Rosenberg. What did you mean by that?

A By withdrawal, I mean that people will impart or totally remove themselves from an active role in society when threatened, and I think there are numerous examples here. Let me cite one.

A case in 1970, when the United States Government was participating in the national census, they found that in the urban centers where there were large numbers of welfare recipients that they were unable to have access into their homes, many of their homes, and one of the major reasons that the recipients were unwilling to allow the census takers to come in was because of a refusal to allow them to see what their private world was all about.

In other words, people do withdraw and

wish to and demand a world away from the eyes of big brother or the government.

Q How would this pattern of withdrawal manifest itself in the case of an individual about whom triplicate prescription data is filed in Albany?

A Well, again the analogy, I think, is appropriate in that a number of such people may withdraw psychologically. They may actually withdraw from taking the drug, because they refuse to have the record put on tape in a computer in Albany.

They may withdraw in other ways. The fear may create resistance to sharing themselves with other people and they may just withdraw inwardly.

Some psychiatrists have done very extensive studies on this. I'd just like to cite a very critical study by the eminent Dr. Horney who showed in her research that people who are continuously concerned about their privacy being intruded upon, a reaction can be a total withdrawal from society, carrying the pendulum to the other extreme and threatening withdrawing completely.

Q You also mentioned a decline in productivity, Dr. Rosenberg. What did you mean by that?

A People who are threatened or in fear of information being recorded or people who lose their

privacy react to this by their productivity or active role on the job by being affected in a negative sense. A number of studies to support this.

During the second World War, Dr. Maslow, M-a-s-l-o-w, who was a former president of the American Psychological Association, showed that prisoners, prisoners in camp, concentration camps, were derived of many of their physical and psychological needs, one of them being lack of privacy where they were constantly being observed by guards and more importantly by fellow prisoners, and because of this lack of seclusion, they were unable to perform their activities openly and with success.

There are other examples. Dr. Katzell, K-a-t-z-e-l-l, Professor of Psychology at New York University, conducted a study in which he showed sailors on board submarines also lacked a private world. It's very hard to hide in a submarine away from other sailors. This led to increased hostility and mutual mistrust.

Q What is the bearing of these studies, Dr. Rosenberg, on the filing of the triplicate prescription form in our case?

A Well, I think there could be two direct links here.

No. 1, that the information or the perception that information may be recorded can affect the child's performance in school, socially, sports, etc.

And I think also, another direct link, is that fear increases a mistrust, and here we would be very concerned with the relationship between the patient and the doctor. If indeed the doctor is perceived by some patients as an agent -- in quote -- an agent of the state, and might reveal some of this data because he is obligated to reveal the data to an agency, this inevitably must affect the relationship between the patient and the doctor.

Q Are you saying that it will affect the relationship because the patient will be less frank and forthcoming with the doctor?

A Yes.

Q You also mentioned creating a warm or a cold personality. Will you explain what you meant by that?

A Well, I put these two words in parenthesis because they are subjective words.

Q You mean quotation marks?

A What did I say?

Q Parenthesis.

BEST COPY AVAILABLE

A Quotation marks. Thank you.

That the way the individual reacts to his society can definitely affect his attitudes and the way in which his personality will evolve.

Let me give you two very critical studies here. A gentleman by the name of Spiro, S-p-i-r-o, who was a leading researcher made a study of the Israeli kibbutz, and he found that children who grew up 25 years ago on a kibbutz were very antagonistic toward their style of life which limited the amount of privacy that they had as they were growing up on a kibbutz, sharing rooms, sharing a room with many children, and the overwhelming reaction to this is that the next generation of Israelis to a very great extent refuse to permit their children to share the kibbutz life, with the major reason being the lack of privacy.

I think a more important study made by a gentleman named Gertz, G-e-r-tz, who did anthropological study in Indonesia. He compared two societies, the society of Java and Bali. To a great extent these two societies are very similar.

One very important difference relates to the issue of privacy. The people in Bali have what are referred to by Gertz as warm personalities. They are

open, they are free in their communications, while in Java, they are very stuffy, very cold. And he attributes this to the style of life that they had as they were growing up and interacting with other people.

In Java, there is virtually no privacy in their society. Huts are designed which do not have doors. There are no walls in their society. One cannot easily hide from observation. People are constantly walking in and out of rooms. One dresses and undresses with people around.

And he compared this to Bali where there are stone walls around huts, where there are doors, where there is seclusion.

And his linkage here is that those from Bali who have the privacy evolved and had warm personalities, while in Java since they had limited or no privacy reacted by becoming very cold and stuffy in their personality.

Q What is the affect of this type of observation that you have been making with respect to the triplicate prescription law that is at issue in this case?

A Again, I draw a direct line here saying people who are fearful of loss of privacy may evolve and

certainly some will evolve having a rather cold, stuffy personality, and not passing a negative judgment on this, I think the critical question what kind of society do we want. Do we want people to be open and free or do we want them to be cold, suspicious.

Q You also mentioned a loss of openness or smaller likelihood of truthful expression. What did you mean by that?

A I think a critical point in revealing what is -- what one believes in very often it can only be done comfortably when one is secluded from the outside world, and when one does not have this opportunity, one will refrain from revealing truthful statements.

I think there are numerous examples of this. Major decisions by corporations are not made before the open camera very often. They are made in a closed board room.

Critical decisions in labor management negotiations likewise, may take place in a private smoke filled room with few people there.

Judges chambers are used for decisions that are made without access by the public.

It is interesting to note that when the Constitution of the United States was framed in

Philadelphia, it was done in a closed meeting where no outsiders were permitted other than those who were needed, and every participant in the drafting of the Constitution was sworn to secrecy.

Q And closed sessions of congressional committees would be another example.

A Yes, it would be.

Q What is the conclusion that you derive from these various mechanisms of society that are established so as to insure confidentiality while deliberations are being made?

A Excuse me. I didn't --

Q What is the conclusion that you draw from these various mechanisms that you have described that are designed to insure privacy and confidentiality while decisions are being made?

A What mechanisms?

MR. LESCH: Would you read beack the question?

(Read question.)

THE WITNESS: I conclude that there are various negative strains put upon people and fears created because of this collection of information on a computer in Albany.

Q And that persons are likely to be more truthful and freer in the expression of their ideas, if they are not threatened by one invasion of their privacy or another?

A Right. Absolutely.

Q How would that bear on the required filing of triplicate prescriptions under the statutes that we're discussing?

A Well, truthfulness requires a feeling of comfort, security, and if people or patients are concerned that this information is recorded, they will be less truthful with their doctors and the doctors may be less truthful with the patient.

Q Would that also apply to a legislator about whom a triplicate prescription form was filed?

A It might very well be so.

Q You also mentioned, I believe, a loss of autonomy. What did you mean by that?

A Well, by loss of autonomy is meant that people should decide for themselves when they want to go public, when their private world is to be revealed, and it should not be decided by an outside organization.

I think an example which is very pertinent here is that the United States Army has a set of records

released upon a soldier's leaving the military. These records contain a host of information which includes coded symbols which might indicate some behavior on the part of the soldier. And this is used or perceived -- excuse me -- this is perceived by the soldier as a form of control or coercement.

Q Are you saying that the Army uses the threat that unfavorable information will be revealed about a particular soldier or about all of the soldiers in the Army as a method of controlling them while they are in the Army?

MR. FOGARTY: Objection.

A It could be used.

Q What is the bearing of this loss of autonomy as you have described it on the triplicate prescription law that we're discussing here?

A That information so recorded might be used in a -- might be used to coerce or force people into certain behavior patterns, might. I emphasize the word "might."

Q You also mentioned that there are physical symbols that can result from invasion of an individual's privacy. What did you have in mind there?

A All people physically react to excessive

strain. In this particular case, when there is -- when the individual sees pertinence in the information being released, if he thinks it is very critical to his destiny, he may react physically by sweating, by exhaustion, by blood clotting.

There are some very important medical studies that have been made in this area. Several cardiologists in San Francisco a few years ago found that certified public accountants when they work -- who work on income tax develop as a result of a strain over a four month period increased blood clots, and this peaks on April 15th of the year.

Recently, there have been statements made by physicians, psychiatrists, regarding President Nixon, former President Nixon's phlebitis and illness which has been directly connected to blood clotting. And they state that the increased disclosure, forced disclosure has put a heavy burden, heavy pressure on the former President which has led to these physical symtoms.

Q Dr. Rosenberg, what is your conclusion? Specifically is there a negative psychological impact on every person who knows that a triplicate prescription concerning drugs that he or his family is taking are filed in Albany?

A There is a negative impact, yes.

Q Are you saying that in certain cases this negative impact will be substantial and will result in one or more of the psychological and/or behavioral reactions that you have just described?

A In certain cases, yes.

MR. LESCH: I have no further questions.

The record should reflect that during the course of Dr. Rosenberg's examination, Mr. Ambrose Donovan, who is an attorney for the Department of Health, and Mr. Joseph Cannizzaro entered the deposition room.

(Short recess.)

EXAMINATION BY MR. JAFFE:

Q Dr. Rosenberg, in your study of privacy, have you found that there are particular areas of human conduct in which individuals and society expect privacy?

A Yes, I think most people expect a degree of privacy in their daily life. Certainly we expect privacy in sexual relations. We expect privacy in conversation with close friends. We expect privacy in relationships with medical persons, psychiatrists, psychotherapists. There are other relationships

certainly.

Q But the expectation with doctor is a traditional and well established expectation?

A I think it's called privileged communication.

Q That is not only expected in effect by the individual, but it is an expectation which society has generally accepted, is that correct?

A Right.

Q You have described a series of damaging effects which are the result of a loss of privacy. Would those damaging effects be increased, if the situation in which they took place was already a stressful situation?

A Yes.

Our behavior and thinking process is very much influenced by what we expect, what we anticipate, how we perceive a certain environment.

If this -- even before this information is recorded on a computer in Albany, even prior to a patient knowing about this, any situation which might be a reversal of what the patients anticipates --

Q Dr. Rosenberg, I am speaking about the facts that, for example, some of the examples you used were concentration examples -- that's an extreme example.

A Right.

Q But in this litigation we're involved in the taking of a serious drug which is in itself a situation of strain.

A Right.

Q That situation could be a situation in which the patient is seriously ill, for example.

In the situation where the patient is seriously ill, would not the likelihood or the degree of damage from the conditions you have described be increased?

A Yes, it would be. It might be. There might be an increased strain.

Q In that situation, you have already said the patient would expect privacy. Is it not true that the discovery on the patient's part when under a condition of strain that his conduct was about to be recorded would create an increased strain at that point?

A It might very well increase the strain, yes.

Q Isn't it true that not only would there be a resentment on the part of the patient that his privacy was going to be denied, but also that his expectation had been radically reversed?

A Yes.

Q That would increase his sense of strain?

A Any reversal or alteration of expectancy would increase frustration, expectation or strain, yes.

Q Would that have any impact on his feeling of loss of privacy?

A Yes, it would.

Q Would this law as you understand it as a result increase the damaging affects which you have described to the patient?

Let me rephrase the question.

Would the existence of this law have increasing damaging affects on the patient?

A Yes, it would.

MR. JAFFE: I have no further questions.

EXAMINATION BY MR. FOGARTY:

Q Mr. Rosenberg, I think your basic thesis initially was that fear begets conformity.

A A major thesis, yes.

Q Where in your opinion would fear come from with regard to Schedule II drugs?

A It comes from within the person. It's a judgment made by the individual.

Q But it would have to be based on something outside the individual, would it not?

A Yes, it would be.

Q Where do you think that would come from?

A In terms of Schedule II drugs?

Q That's right. We're only talking about Schedule II at this moment.

A It would come from knowledge that such records are kept, and a concern for how confidential these records would be, who has access to them, who might have access to them when the person has no authorization for access, how long will these records be maintained.

Fear might come from the concern that others who would be in a position to control his life, employers, teachers, other people in positions of power, who might have -- gain access to this information and perhaps use it against him.

Fear is a very subjective term and much of the fear is real and part of the fear, of course, is created, but the created fear which may be fictional still plays a very powerful role in the individual's psyche.

Q So that, in effect, Mr. Rosenberg, fears are based really on what we found out or what people tell us, plus our experience, but at this point we will

talk only about what we know or what people tell us.

A I agree. A good part of the fear is based on experience and what people tell us, but there is also a good part of the fear is what we think will occur.

Q No question of it.

Would it be fair to say that the normal person's fear decreases as his knowledge increases?

MR. LESCH: Knowledge of what? If it is knowledge of something fearsome, I suppose the normal person's fear would increase.

MR. FOGARTY: Are you making an objection, Mr. Lesch, or a comment?

MR. LESCH: I am objecting to the form of the question.

MR. FOGARTY: Fine.

Answer the question, please.

THE WITNESS: Would you repeat the question for me.

MR. LESCH: If you don't understand the question, you don't have to answer it.

MR. FOGARTY: Would you like to testify, Mr. Lesch?

MR. JAFFE: There is an objection.

MR. FOGARTY: The last thing was

not an objection. It was a comment to the witness.

MR. LESCH: I was instructing the witness that he does not have to answer a question, if he can't understand it, and that he has the right to ask you, Mr. Fogarty, for clarification of any question that he does not understand.

MR. FOGARTY: But he hasn't asked me for it yet, has he?

MR. LESCH: There was a puzzled expression on his face which precipitated my remark to him.

MR. FOGARTY: Would you repeat the question to the witness, please.

(Read question.)

A Would you explain what you mean by knowledge?

Q In this case we're limited to Schedule II drugs.

A You're asking would his fear increase as --

Q Would his fear decrease?

A Would his fear decrease as he learns that there is a recording being made of his usage of Schedule

II --

Q That basically I think we would have to assume he knows, that that's part of the basis of his fear.

A The answer is it may increase.

Q If the --

MR. LESCH: Did you say increase then?

THE WITNESS: It may increase. The fear may increase.

Q If the patient learns exactly what information is being transmitted to the Department of Health who are the custodians of Schedule II prescriptions, do you think that might affect his fear?

A I'd like to ask -- when we're saying the person, are we talking of the child as the person, are we talking of the parent of the child? Because I think there might be different answers based upon who is the person.

Q Basically you are going to be talking about adult people because I don't think that doctors are going to discuss Schedule II drugs with a child. They will be discussing them with the parents and not with the child. At least I would assume that to be the case. That has been the testimony so far.

MR. LESCH: It seems to me, with all respect, Mr. Fogarty -- are you making the assumption that a child will not find out about the fact that triplicate prescriptions are being filed merely because the doctor does not tell him that?

MR. FOGARTY: I am talking about the imparting of knowledge. I am not talking about what the child knows. At this particular point that's what I'm talking about.

MR. FERZIGER: I am going to object to the question as to form.

MR. FOGARTY: Would you answer the question, please.

A The question -- might you read the question.

(Read question.)

MR. FERZIGER: I have an objection to the question as to form.

A First let me say I haven't -- I do not know exactly what the questions or items on the form are. So I cannot give a total answer to your question.

It indeed might minimize the fear, if he knows what the questions are. It might minimize the fear. However, I don't think it is alone an issue of

what information is being collected. I think it's a question of how the information would be used or misused.

Q Do you think that if there was imparted to a patient or the parent of a patient the purpose for which the information was being transmitted that this might have an affect on their reaction or their fear?

A It might have an affect. It might have an affect.

Q Would you agree, Mr. Rosenberg, that what we are dealing with in Schedule II --

MR. LESCH: This is Dr. Rosenberg, by the way.

MR. FOGARTY: I'm sorry. I usually use that with reference to medical people, but my apologies, Doctor.

Q -- that the substances in Schedule II are dangerous substances?

A The general definition of the word dangerous, I would agree.

Q And that they are so regarded by the medical profession as well as the legislator?

MR. FERZIGER: That is objected to.

MR. LESCH: I object to this question. Dr. Rosenberg is not a member of

the medical profession. He is not qualified to answer this question.

MR. JAFFE: I object in substance. I don't believe they are nor is there any showing that they are dangerous.

MR. FERZIGER: I further object to the question on the grounds that the legislator has not deemed them to be dangerous drugs.

Q Dr. Rosenberg, you stated you are not aware of what goes into a Schedule II prescription.

A I have not seen a Schedule II prescription form.

Q But you are familiar with Article 33?

A Yes.

Q You have no knowledge of what is reported to Albany?

A I don't have total knowledge of what is -- I don't have total knowledge of all the information requested.

Q What is your knowledge of what is reported to Albany or your understanding?

A Patient's name address, some biographical -- that includes some biographical information, and information about the drug itself.

Q What type of biographical information?

A I believe it would include his age, certainly the doctor's name might be -- I don't know beyond that what else would be included.

Q What information about the drug would be placed in it?

A I don't know the specifics on that.

Q What type of information, Doctor, goes into a normal prescription, other than Schedule II?

MR. FERZIGER: I am going to object to that on the grounds that he is not qualified as a physician.

A I can answer that as an ordinary citizen who has had prescriptions.

Q Fine. I will ask another question.

Have you ever been to a doctor?

A Medical doctor?

Q Yes.

A Yes.

Q Have you ever had a prescription?

A Yes.

Q Do you recall what kind of information was on it?

A If I could read it, I think I would

conclude it would have in addition to the doctor's name imprinted on the prescription, patient's name, my name in this case, the drug or medicine requested, the amount requested. I don't know. There might be other things. I've never studied prescriptions.

If I knew they were being recorded in a computer, I might study them more carefully.

Q If you were aware that the State Department of Health had access to them whether they were in the computer or not, would you have studied them?

A Yes.

Q Were you aware that they have always had access to them?

A To all prescriptions?

Q Yes.

A No, I was not aware.

Q You were not aware that under the law the Department of Health could at any time go into a pharmacist and examine all the prescriptions in his possession?

A No, I was not aware.

Q Does it change your opinions now that you are aware of it?

MR. LESCH: Opinions of what?

MR. FOGARTY: Opinions expressed here today.

MR. LESCH: He was not expressing any opinions with respect to ordinary prescriptions. Therefore, I object to the form of the question as misleading.

MR. FOGARTY: Would you answer the question, Doctor, please.

MR. LESCH: If you are able to answer the question.

A You want to know if it changed my opinion?

Q Yes.

A No, it does not change my opinion.

Q It does not change your opinion as to privacy or anything else?

A Now I don't understand the original question.

Q The question was that the regular prescriptions are as available to the State Department of Health as the Schedule II.

MR. FERZIGER: That's objected to as to form and content in view of the fact that it is not the situation. The situation in the old 33 was that the pharmacist must have kept a record and if the Department wanted

to make an investigation, they could go in and ask the individual pharmacist to look at his records.

MR. FOGARTY: Fine, Mr. Ferziger. That made them available to the Department of Health, did it not?

MR. FERZIGER: Only on an investigation.

MR. FOGARTY: That made them available, did it not?

MR. FERZIGER: No, it did not in my opinion.

MR. FOGARTY: That's your opinion. Would you answer the question.

MR. JAFFE: There is an objection to the question.

MR. FOGARTY: There is an objection and it is on the record. Answer the question. The judges will rule.

MR. FERZIGER: He is directed not to answer.

MR. LESCH: No, wait. Let him answer. If the witness is able to answer the question, let him answer.

MR. FOGARTY: Fine. Exactly, Mr. Lesch. The judges are going to pass on these objections, not us.

A I have to get clarification of what your question is. I would like it repeated by you or the reporter.

MR. FOGARTY: Read the question.

(Read question.)

MR. LESCH: Off the record.

(Discussion off the record.)

MR. FOGARTY: Would you read the original question to the witness, please.

(Read question.)

THE WITNESS: The question is does it change my opinion.

MR. FOGARTY: Yes.

THE WITNESS: Substantially, it does not change my opinion.

I would just make this one point. In my judgment as an individual, there is a big difference between information recorded in a computer in Albany and the right of the State to seek a prescription from a pharmacist. There is a big difference there.

BY MR. FOGARTY:

Q What do you see as the big difference, Doctor?

A One is when it's computed -- when it's within a computer, it's easily retrieved by a mere press of a button. Information is physically available.

The other takes effort, time, manpower, forms have to be filled out, I imagine, to request the information from a pharmacist.

Q But nothing would have to be done to get it out of the computer, is that your thesis?

MR. LESCH: I object to the form of this question again. He said that a button would have to be pressed.

Q Is that all that would have to be done to a computer?

MR. LESCH: The same objection.

A I'm not a computer expert.

Q You have expressed an opinion as to what has to be done, Doctor. That's why I am asking you.

MR. LESCH: He has just answered that he is not an expert and he is unable to answer your question.

MR. FOGARTY: He did not say he

was unable to answer it. He said he was not an expert.

A Request for authorization, demand certain forms and approvals be made. So it's not just the -- anybody pressing a button.

Q Are you aware of any of the procedures involved in obtaining information about Schedule II prescriptions?

A Specifically Schedule II, no. I have an awareness of regulations regarding access to computers in government agencies.

Q Are you aware of the regulations regarding access to computers by the State Department of Health?

A I have knowledge of access to government computers in the State, not specifically --

Q Would you answer the question, please.

MR. LESCH: He is answering the question.

A I did. I just did. I was cutoff before I finished my sentence.

I did not have any specific knowledge of public health agency.

Q The State Department of Health?

A Yes, the State Department of Health.

Q Are you aware of the confidentiality provisions of the statute involved here?

A Regarding Article 33 regarding --

Q The statute we're involved with in this proceeding.

A In the Public Health?

Q That is right.

A I have heard about the confidentiality aspects of it. I have never seen it or read it.

Q From whom did you hear about it?

A Mr. Lesch and perhaps others.

I may have passed it in reading some -- some materials.

Q Do you think it would have an impact on the people working with this information who are charged with the confidentiality of it--

A Impact?

MR. LESCH: May we have that question read back, please.

MR. FOGARTY: I have not finished it yet.

MR. LESCH: Excuse me. You ended with a raised voice so I assumed you finished the question.

BEST COPY AVAILABLE

MR. FOGARTY: It will be raised a lot more before we're through.

Incidentally, what I would like to get straight now is that the objections come through you, not objections coming from other counsel.

MR. LESCH: I represent the plaintiffs, Roe, et al. I am making objections for them. I don't represent the Patient, et al., so that I suggest that Mr. Jaffe and I make objections.

MR. FOGARTY: I am only suggesting it so we get through.

MR. LESCH: What you are saying is agreeable to me as stated before.

MR. FOGARTY: Is it agreeable to them? This is what I don't know.

MR. JAFFE: Are you talking about me at this point?

MR. FOGARTY: Both of you.

MR. LESCH: What I said is I can only object on behalf of the plaintiffs that I represent, but I can't object on behalf of plaintiff, Patient, et al., because I don't

represent them.

MR. FOGARTY: In plain English you refuse then.

MR. LESCH: Off the record.

(Discussion off the record.)

BY MR. FOGARTY:

Q Do you feel that the confidentiality requirements of the law imposes an obligation on the people handling this information to respect that confidentiality?

MR. LESCH: Objection.

A Are you talking of government employees?

Q Yes.

A State government employees?

Q I am inclined to think I'm talking about more than that because more than State government employees handle Schedule II prescriptions.

MR. LESCH: What the witness is asking, Mr. Fogarty, is that you make clear to him who you are talking about in the question. Moreover, you are asking him for interpretation of the State law. I really don't see --

MR. FOGARTY: I am asking for

his opinion not of the State law.

MR. LESCH: You are asking him for his opinon as to what obligations are created by the confidentiality provisions of Article 33 and that's the reason I object to the question.

MR. FOGARTY: He is an alleged expert on privacy.

MR. LESCH: He is not an alleged expert in interpretation of statutes.

MR. FOGARTY: He has interpreted enough of them on direct examination to tell us about them.

MR. LESCH: I beg to differ with you. He has not interpreted any on direct examination.

Q Let's start with the doctors and go right through the State employees, Doctor. That includes the pharmacist who fills it.

Do you think that the statute in imposing confidentiality has an impact on these people?

MR. LESCH: May I ask that in all fairness he be shown a copy of the statute which he is now being asked to interpret.

MR. FOGARTY: He testified on direct he is familiar with it.

MR. GREENWALD: Off the record.

(Discussion off the record.)

MR. FOGARTY: Read the last question.

(Read question.)

MR. LESCH: Let the record reflect that we have handed Dr. Rosenberg a copy of the Article 33 of the Public Health Law and I have directed his attention to Section 3371 thereof, which I understand to be the provisions to which Mr. Fogarty is referring. If it would help speed this up, Mr. Fogarty, I would be willing to stipulate that the statute applies to persons who have knowledge by virtue of their office of the contents of the triplicate prescription forms among other documents.

MR. FOGARTY: Fine. I will accept the stipulation. Then I would like the doctor's answer.

A I would first like to say as it has been stated before that I am not a legal expert nor a medical

physician and follow that by saying there is a difference in doctors and physicians and State employees having access to information.

Pharmacists and doctors, of course, have to be licensed by the State, and confidentiality is a very important and sensitive issue to them and I think that their behavior would and should be controlled.

I also -- with employees, bureaucratic employee, they are not licensed or certified by the State as far as I know. And I think even though they are very sensitive to the issue of confidentiality, there have been repeated breakdowns in this adherence to the regulations. And I think any book on the issue of -- any scholarly critical book on data accumulation will show that overzealous bureaucrats have at times entered files when they should not have.

Q What are overzealous bureaucrats, Doctor?

A It's a phrase used by a great number of people to describe employees of a government agency who in their dedication to their task, in their eagerness to do a thorough job might go a little too far. I think that is what is meant by overzealous.

Q Would you define the second part of your term?

A Bureaucrat?

Q Yes.

A A bureaucrat, I would define -- and I'm not sure this is the definition within a dictionary, but I would define it as a bureaucrat is any person who works for a government agency.

Q Would your definition change any if that employee was a doctor?

A A doctor employed by the State?

Q Yes.

A He is a doctor and a bureaucrat also.

Q His status changes, I assume, from your comments.

A His status?

Q His respect for confidentiality, let's say, changes when he becomes a state employee.

A He is still licensed as a doctor by the State and his foremost --

Q In other words, he has just as much respect for confidentiality as a private practitioner, does he not?

MR. LESCH: I object to these questions on the grounds that they call for speculation about unnamed doctors and unnamed physicians, and they are entirely, with all

respect, meaningless.

Q Dr. Rosenberg, you said pharmacists have a very high regrad for confidentiality, right?

A No, I didn't say that.

Q You said that doctors --

A And pharmacists who are licensed by the State should have a greater respect.

Q But you didn't say should, did you?

MR. LESCH: Now we're arguing with the witness. The record says what it says, Mr. Fogarty.

A I can't take all doctors and pharmacists in the State and say they do have. I don't -- I have never interviewed them.

Q Thank you.

The examples you gave us of stress situations and people's reactions or fear of information becoming or getting outside themselves, if we can put it that way, are all regarding people in confined environments, aren't they?

A Confined?

Q You talked of the Army, submarines, the kibbutz. All of these people are in what might be considered a confined environment?

A In the examples you just threw back were in some respects confining, but there were examples given that were not in confined environments.

Q What examples did you give that were not confined?

A I gave an example of certain public accountants. I gave an example of the President of the United States. I gave an example of, I think, children and peer pressure within a classroom. Speaking out in terms of expressing one's point of view about government or industry.

These are not confining.

When you say confined, I think of walls, confining a person.

There are examples in that category and there are examples not in that category.

Q Did you give any examples dealing with State laws regarding prescriptions?

A Did I give any examples?

Q Yes.

A No, I did not give direct examples.

Q Have any studies been made?

A Of what?

Q Of laws similar to this.

A Have any studies been made of laws?

Q Of the affect of laws similar to this on people.

A Well, if you say studies, you mean published studies?

Q I am talking generally of the examples you gave which were the product of studies made by, I would assume, colleagues in either the medical or psychological fields.

A There might have been some studies.

Q But you are not aware of them, are you?

A Specific to --

Q This particular problem.

A With this specific problem?

Q Right.

A No, I am unaware of it, of any such studies.

Q So that --

A The statute went into effect a year and a half ago approximately, right?

Q That is correct, in New York.

A So I would -- it would be very hard to find any such studies made in the past year and a half, if indeed any such studies were made.

Q Would it be hard to find studies in the

last 20 years in California?

A I don't know.

Q You spoke about submarines, you spoke about the Army. They are not all in New York. California has had a statute similar to this for 20 years.

A So you are asking if any such studies have been made in California?

Q If you are aware of any such studies.

A No, I'm not aware.

Q So that your application of the studies is in a sense hypothetical?

A Is in a sense hypothetical?

Q Right.

A I'm drawing from these studies to conclude something.

If your question is do I have direct evidence from Schedule II drugs in a study made of Schedule II drugs in New York State, the answer is no.

Q Fine. That precludes my next question.

A I'd like to add something which I think we're overlooking. Maybe it's in a future question.

But the major thrust in my statements does not deal with the data in a computer in Albany and how it may or may not be misused, although that

is a critical problem and concern.

I am building an argument that just the accumulation of data has a negative affect upon people. And also I am saying that people are not secure in knowing how this information is handled. You may show all sorts of precautions against leakage, against intrusion. I'm saying that the public does not have faith because there have been enough examples where there have been intrusions that this in and of itself, what they think, will create a number of fears and strains on their individual well-being.

Q This, of course, is your opinion of what they think?

A Is my opinion based on studying the area, studying the issue.

Q On the studies that have been done that you have related to us?

A No, far beyond that. Studies done of information collected on people and put in storage. There have been studies made.

Q But you have related the effect of those studies to us, haven't you? On your direct examination you went over them, didn't you?

A I left out some studies which also support

that people are very cautious, antagonistic, not trusting.

I understand Monday -- I was not at the hearing Monday. I understand there was a man who was -- who is dying of cancer -- excuse me.

Q I am listening to you. Don't try to analyze me at this short range.

A I'm not trying to analyze you. I thought you were trying to cut me off.

Q No. Don't worry. When I want to cut you off, I will cut you off and you will know it. You were going to say something, Doctor. If you want to say it, go ahead.

MR. LESCH: You started to say a man was dying of cancer.

THE WITNESS: A man was dying of cancer who needed a certain drug which is under Scheudle II and went out of his way to go to New Jersey to get this drug -- I don't know how often he would have to go, but he went out of his way to get the drug in New Jersey so as to -- so it would not be filed because of regulations not required in the State of New Jersey.

Now this takes effort, gumption,

perseverance. It reflects an attitude.

Q Was it also related to you, Doctor, that that attitude was based on lack of information?

A Lack of information?

Q Yes.

MR. JAFFE: Objection.

It is simply not true.

A I don't understand what you mean.

Q Was it also related to you that on cross-examination the man pointed out that he made claims to an insurance company for those prescription drugs?

A No, that was not mentioned.

Q So that he was placing the information into other computer, wasn't he?

MR. JAFFE: Objection.

A I don't know enough to answer or respond.

Q I see. You only know what you were told.

A But the point I'm making today --

Q I know the point you are making, Doctor. That is the end of my question.

MR. LESCH: Do you want to finish your answer?

THE WITNESS: I'd like to finish.

MR. LESCH: Go ahead.

THE WITNESS: That people will do things which might be considered abnormal or strange to avoid the outstretched hand of an agency that they don't want to give information to, that they feel the agency has no right to this information. It talks of individuality which I consider and I think most of us consider rather important in this country.

Q You characterize this man as dying of cancer.

A That's what I was told.

Q Would it surprise you that there was no evidence of that in the case?

MR. JAFFE: Objection.

A It doesn't really matter.

Q I think it does.

A It doesn't really matter. I think it was a dramatic example to state that he was dying of cancer. If he was a perfectly healthy human being, it would still apply.

MR. LESCH: Off the record.

(Discussion off the record.)

MR. FOGARTY: I have no further questions.

MR. LESCH: No redirect for me.

MR. JAFFE: I have none.

(Time noted: 12:00 noon.)

Subscribed and sworn to before me

this____day of_____, 1974.

C E R T I F I C A T E

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, WILLIAM BLITZ, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That DR. JOSEPH MARTIN ROSENBERG, the witness whose deposition is hereinbefore set forth was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have here unto set my hand this 18 day of December, 1974.

WILLIAM BLITZ, CSR

I N D E X

WITNESSES

PLAINTIFFS'	EXAMINATION BY	PAGE
Dr. Joseph Martin Rosenberg	Mr. Lesch	19
	Mr. Jaffe	38
	Mr. Fogarty	41

EXHIBITS

PLAINTIFFS' TRIAL		FOR IDENT.
1	Sample Triplicate Prescription Form (Deposition Exhibit 23),	3
2	Chart entitled "Phase II: Practitioner Rx Work Flow Chart" (Deposition Exhibit 1),	3
2A	Same document as Exhibit 2, with additional material (Deposition Exhibit 17),	4
3	Document entitled "Phase II: Practitioner Rx Nacro Flow Chart B" dated 8/7/73 (Deposition Exhibit 3),	4
3A	Same document as Exhibit 3, but dated 11/29/73 and containing additional material (Deposition Exhibit 18),	4
4	Document entitled "Schedule II Controlled Substances System, Draft 9/14/73 Phase II: System Update - Filled Prescription-Practitioners (Phase II Practitioner/Rx Work Flow Chart)" (Deposition Exhibit 3),	5

EXHIBITS (cont'd)

PLAINTIFFS' TRIAL		FOR IDENT.
5	Document entitled "Reported Missing Practitioner Rx's Which Have Been Filled" (Deposition Exhibit 4, 11),	5
6	Document entitled "Practitioner Prescription Criteria Deviations" (Deposition Exhibit 4A, 11A0,	6
7	Document entitled "Practitioner Rx Transaction Record Edit Error Listing (Asterisk Indicates Error)" (Deposition Exhibit 4B, 11B),	6
8	Document entitled "Procedure for Daily Editing of Triplicate Prescriptions" (Deposition Exhibit 5),	6
9	Document entitled "Identification Division, Program-ID. 'H66034'" (Deposition Exhibit 6),	7
10	Xerox copy of a handwritten document showing printouts to be prepared monthly (Deposition Exhibit 8),	7
11	Document entitled "Schedule II Controlled Substances System, Phase II: System Update - Filled Prescription-Practitioners (Phase II Practitioner/Rx Work Flow Chart)" with attachments (Deposition Exhibit 10),	7
12	List of five computer programs using data from the filled prescriptions (Gottheim 58),	8

BEST COPY AVAILABLE

EXHIBITS (cont'd)

PLAINTIFFS' TRIAL		FOR IDENT.
12A	Program No. 1,	8
12B	Program No. 2,	8
12C	Program No. 3,	9
12D	Program No. 4,	9
12E	Program No. 5,	9
13	Printout entitled "Practitioner Rx Transaction Record Edit Error Listing" (Cannizzaro 83-86),	9
14	Printout entitled "Schedule II Substances Dispensed and Processed in Month of February" (Cannizzaro 83-86),	10
15	Printout entitled "All Prescriptions Processed in Month of February" (Cannizzaro 83-86),	10
16	Printout entitled "Report of Duplicate Prescriptions Processed in Month of February" (Cannizzaro 83-86),	10
17	Printout entitled "Unmatched BNDD Numbers" (Cannizzaro 83-86),	11
18	Printout entitled "Patients With Rx Total Dose In Excess 30 Day Supply In Month of February" (Cannizzaro 83-86),	11
19	Printout entitled "Alphabetic Listing of Practitioner Master File" (Cannizzaro 83-86),	11

EXHIBIT (cont'd)

PLAINTIFFS' TRIAL		FOR IDENT.
20	Printout entitled "New York State Department of Health Physicians List By Name" (Cannizzaro 83-86),	12
21	Printout entitled "New York State Department of Health Master Mailing File" (Cannizzaro 83-86),	12
22	Letter to New York doctors from Commissioner Ingraham dated November 28, 1973 and attachment thereto (Baker 239),	12
23	Memorandum from Mr. Bellizzi to Commissioner Whalen dated June 20, 1973 (Attachment 5 with letter dated July 12, 1974 from A. Seth Greenwald, Esq. to Michael Lesch, Esq.),	13
24	Memorandum to Doctor Baker from Mr. McDermott dated October 11, 1973 (Deposition Exhibit 13),	13
25	Memorandum to Doctor Baker from Mr. McDermott dated October 23, 1973 (Deposition Exhibit 9),	13
26	Unsigned memorandum, dated June 12, 1974. Subject: Investigations going to more than one Doctor (1974) (Bellizzi 70),	14
27	Unsigned memorandum, dated May 12, 1974. Subject: Case Reports of violations of going to more than one doctor, Cases Reported (1969-1974) (Bellizzi 45-46),	14

EXHIBITS (cont'd)

PLAINTIFFS' TRIAL		FOR IDENT.
28	N. Y. State Department of Health Flier entitled "How the Controlled Substances Act Affects Medical Practitioners in New York State" (Deposition Exhibit 21),	15
29	Audit Report on Financial and Operating Practices, New York State Identification and Intelligence System, Report No. AL-ST-29-71,	15
30	Stipulation among the Attorneys for the parties "So Ordered" on July 2, 1974,	15
31	Reporting of Sales of Dangerous Drugs, Second Interim Report of the Temporary State Commission to Evaluate the Drug Laws (Albany, N. Y. April 5, 1971),	16
32	Proposed New York State Controlled Substances Act and Revision of the Penal Law, Interim Report of the Temporary State Commission to Evaluate the Drug Laws (State of New York - (1972) Legislative Document No. 10),	16
33	Memorandum of Chester R. Hardt, Chairman of the Temporary State Commission to Evaluate the Drug Laws (Appendix to Court of Appeals, pp. 40a-44a),	17
34	Plaintiffs' first set of interrogatories,	17

EXHIBITS (cont'd)

PLAINTIFFS' TRIAL		FOR IDENT.
35	Plaintiffs' second set of interrogatories,	17
36	Defendant's responses to plaintiffs' interrogatories.	18

oOo

Deposition of Joseph Jules Wasserman.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

RICHARD ROE, an infant, by ROBERT ROE, his parent, JOHN DOE, an infant, by MARY DOE, his parent, JAMES MOE, an infant, by MICHAEL MOE, his parent, JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

-and-

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Additional Plaintiffs,

-against-

HOLLIS S. INGRAHAM as Commissioner of Health of the State of New York,

Defendant.

INDEX NO.
73 CIV 1303
(RLE-3 Judge Court)

- x

Deposition of JOSEPH JULES WASSERMAN, a witness, taken by plaintiffs pursuant to order, at the offices of Messrs. Shea, Gould, Climenko & Kramer, 330 Madison Avenue, New York, N. Y. 10017, on December 4, 1974, at 2:10 p.m., before William Blitz, a Certified Shorthand Reporter and Notary Public of the State of New York.

BLITZ-LORBER REPORTING CO.
CERTIFIED SHORTHAND REPORTERS
15 PARK ROW, N.Y. 10038
PHONE 349-6760

APPEARANCES:

Messrs. SHEA, GOULD, CLIMENKO & KRAMER,
Attorneys for plaintiffs,
330 Madison Avenue,
New York, N. Y. 10017
BY: MICHAEL LESCH, ESQ.,
JOHN PREEFER, ESQ., Of Counsel
-and-
SOLOMON Z. FERZIGER, ESQ.,
1345 Avenue of the Americas,
New York, N. Y. 10019

LOUIS J. LEFKOWITZ,
Attorney General,
State of New York,
2 World Trade Center,
New York, N. Y. 10047
BY: MICHAEL P. FOGARTY, ESQ.,
A. SETH GREENWALD, ESQ.,
Assistant Attorney Generals

Messrs. NORWICK, RAGGIO & JAFFE,
Attorneys for additional plaintiffs,
2 Pennsylvania Plaza,
New York, N. Y. 10001
BY: MILES JAFFE, ESQ.,
Of Counsel

ALSO PRESENT:

AMBROSE P. DONOVAN, JR., ESQ.

JOSEPH BONACCI

JOSEPH L. CANNIZZARO

oOo

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties herein, that the sealing, filing and certification of the within deposition be waived; that such deposition may be signed and sworn to before any

officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the officer before whom said deposition is taken.

oOo

J O S E P H J U L E S W A S S E R M A N, called as a witness by the plaintiffs, being first duly sworn by the Notary Public (William Blitz), testified as follows:

MR. LESCH: We have the same stipulations with respect to this deposition as we had with respect to the deposition of Mr. Rosenberg, is that correct, Mr. Fogarty?

MR. FOGARTY: That is correct, Mr. Lesch.

EXAMINATION BY MR. LESCH:

Q Mr. Wasserman, what is your profession?

A President of Computer Audit Systems, Incorporated.

Q What is Computer Audit Systems, Incorporated?

A It's a firm that specializes in auditing controls and security of computer systems.

Q How long have you been in the business of examining the auditing controls and security of computer

systems?

A The company has been in business for almost 5-1/2 years.

Q How long have you been in that business, sir?

A Prior to that, I started in computer auditing and security with the Southern New England Telephone Company in April of 1959.

Q Since April of 1959 to the present, has that been your occupation?

A Yes, it has been.

Q Are your qualifications and background set forth in this resume which I am handing to you?

A Yes, they are.

MR. LESCH: Off the record.

(Discussion off the record.)

MR. LESCH: May we have this resume of Joseph J. Wasserman consisting of four pages marked as Plaintiffs' Trial Exhibit 41 for identification.

(Resume of Joseph J. Wasserman consisting of four pages, marked Plaintiffs' Trial Exhibit 41 for identification as of this date.)

Q Mr. Wasserman, does Plaintiffs' Trial Exhibit 41 accurately set forth your qualifications in the fields of computer security, internal control

programs and the other areas of your specialization with respect to computers?

A I feel it pretty well outlines what I've done with some specific examples of experiences.

Q Is there anything that you would like to add to that resume?

A No.

Q Will you describe the type of work that you have been doing since you first entered the business of reviewing the security of various computer systems?

A Do you mean back with the Bell System? Or --

Q Back with the Bell System or at any other time where you were actually examining the adequacy of security of various computer systems.

A Well, through the last 15 years, I've been very actively involved in this particular area. Probably wrote one of the first articles on computer security which was published in the Harvard Business Review.

And in that period of time, I've not only done security work for various Bell System Companies such as the Southern New England Telephone Company, AT&T, Bell Laboratories and some of their associated companies, but I've also been actively involved for the last five

years with the General Electric Time Share Company, performing all levels of security for the time sharing network.

These activities included reviewing the physical security of their various computer centers, evaluating the procedures for security, and evaluating the security over data stored in both printed and magnetic form.

In addition to the General Electric Company, we've also done work for University Computing Company, Barnett Bank, Trans-American Corporation, United States Naval Audit Service, subcontracted work with Booz Allen where we do their security work for their clients on a subcontract basis and Babcock & Wilcox.

Some of these areas have involved looking at centers that have information that is considered top secret such as the Atomic Energy Commission.

Q In addition to the physical securities, procedural security and data security that you have described, have you been concerned with other types of protection of data from harm or unauthorized disclosure?

A Yes, we have.

In some cases, disclosure of corporate information which is considered proprietary such as

financial statements, payroll systems. Other areas, the protection of name and address lists of large companies such as AT&T, where the name and address of stockholders is considered proprietary in nature.

Access to files that are stored by various clients in the General Electric time share system. Here again to assure that either someone intentionally or unintentionally does not access somebody else's information that is stored in magnetic form in a time sharing environment.

Q What do you mean when you use the term physical security?

A Physical security is the physical sturcture of the data center, the access to the data center, fire prevention, flooding, prevention of intrusion, electrical and telephone intrusion.

Q What do you mean when you use the term procedural security?

A Procedural security is those procedures defined by a company which specifies the level of security and the methods of gaining access to a data center, getting access to information.

Q What do you mean by data security?

A Data security is the protection of data,

both in its magnetic form and printed form.

Q Did you visit the computer center of the Department of Health on January 23, 1974?

A Yes, I did.

Q What were your instructions prior to that visit?

A To observe and review the security of the facility to the best that we could under the situation, both physical, procedural and data.

Q Where was that located?

A In Albany, New York, in a building in a shopping center.

Q What parts of that building did you visit in connection with your inspection of the Department of Health's computer operation?

A We visited to start with a general office area. Then we were taken on a guided tour which included the mailroom, a coding room, the input-output area, and the computer room.

Q When you refer to the input-output area, was that the area where the key to disk and key punch operations were carried on?

A Yes.

Q Did you notice any inadequacies in the

physical security at the locations that you just described starting with the mailroom?

A Well, the mailroom which was supposed to be locked when it wasn't manned was not manned and was open.

In the coding area, the security appeared to be adequate.

The access to the input area, I would say, was inadequate because there really is no positive control over personnel entering the area. There was a man supposed to be sitting at a desk to screen people who came into this area. However, there are two entrances to the input-output area, one of which the door was left open. There was nobody by that particular door, and we were informed that the door was opened because of ventilation problems.

Q In order to maintain adequate physical security, should the door be locked?

A The door should really be locked. And there are a number of methods that can be used, either a card key system where you insert a card with a magnetic strip on it into a device which would open up the door for those people who possess the card, or a chiper lock which is a combination of keys that you would hit which if you had the right combination would allow you to gain

access.

Or the door could be electronically controlled by a guard or a receptionist when an individual walks up to the door -- obviously you would have to have a window -- would observe the individual and then release the lock.

Q Were any of those precautionary measures in effect when you saw the system?

A No, they were not.

Q Were there any other inadequacies that you observed?

A I personally feel that all employees working in an area where sensitive information is being processed should be wearing badges. My recollection is that badges were not being worn.

Also proper screening of people who are external to the State of New York such as telephone company, maintenance personnel who would work on such things as the key punch machine, the computer, maintenance people who would clean the facility should also be assigned badges.

Q Did any of the persons in the input-output area whom you observed have badges?

A Not to my recollection.

Q Did you observe whether there was any procedure pursuant to which non-employees were required to sign in and out as they entered the input-output area?

A No, I did not observe any.

Q Were there any other inadequacies that you observed in the physical security of the input-output area?

A I think those are the major ones.

Q Should there be a system whereby there are alarms on doors and the doors are crash barred for emergency exist only?

A Yes, there should be.

The ideal example is the second doorway to the input area which is supposed to be secured at all times. That particular door should be crash barred so that people can exit in case of an emergency and it should be alarmed and it should not be kept open.

Q Were any of the doors to the input-output area crash barred or alarmed in this fashion?

A No.

Q Did you also observe the computer room?

A Yes, we did.

Q Were there any inadequacies in the physical security of the computer room?

A Well, there are two entrances to the

computer room, one of which you can access from the input area, and the second is a doorway to the hall.

At the time we were there, I observed an individual come through that doorway from a common hallway. Whether he was authorized to be there, I do not know.

Again, our -- my prior remarks as far as alarming that door and it only being used for emergencies would apply to the computer room.

Q Would your prior remarks with respect to badges and the requirement that non-employees be required to sign in and out also apply to that area?

A Definitely.

If the system were implemented where only those personnel who are authorized to go into the computer room were to have a special code on their badge and wear, for example, a color badge, green or blue, whatever it is, that would be a visible as well as a positive control over those people accessing the computer room.

Q Have you finished your description of the physical description of the Department of Health's computer facility?

A Overall, it's a general office building which I believe the State of New York is the main tenant.

I didn't observe any guards or alarm systems other than the alarm system in the coding area where the prescription systems are coded, and would question maybe the overall physical security of the building. However, we did not look in that in any great detail. Though it would appear that anybody could get access to the building and once they were in the building, if they were not challenged, they could probably go to almost any area with the exception of the coding area which appeared to be adequately secured.

Q Does that complete your description of the physical security?

A Yes, it does.

Q Did you also study the procedural security of the State's system with respect to triplicate prescription data?

A To the degree which we were given information and to the degree which our questions were asked -- or answered.

Q In connection with your review of the physical security, procedural security and data security of the State system, have you examined Trial Exhibits 1 through 23 in this case?

A Yes.

Q Have you also examined Exhibits A, B and C of the State of New York which are pages 76a through 92a of the record on appeal in this case?

A Yes.

Q Did you conclude whether there are any inadequacies in the procedural security that has been established by the Department of Health in connection with the triplicate prescription program?

A Yes.

In my opinion, one area of weakness is the aspect of background checks for people working in sensitive areas.

We were informed that the check that was given was a normal civil service review of the individual; that there are really no credit checks performed, there are no drug checks performed, and there are no periodic checks performed on, say, an annual basis of people again working in sensitive areas.

This also would hold true for personnel who are non-employees of the State of New York such as Burroughs, the engineers who will work on the computer, maintenance personnel that clean, telephone company, etc.

Q Is it standard procedure to perform background checks on individuals who have access to

confidential data?

A In most businesses, it is.

Q Did you observe any other deficiencies in the procedural securities of the triplicate prescription system?

A Yes, I think there should also be a security manual designed for that particular system.

Most of the procedures alluded to various security procedures for the State of New York. It's been my experience that security manuals are very, very effective, if they are designed for that particular application and data that is going to be secured.

Q As far as you know, is there any security manual which is oriented to the particular problems of the processing of triplicate prescription data by the State?

A No. There were some general statements.

Q In Exhibits A, B and C?

A A, B and C.

And even there some of those statements are rather weak and somewhat inadequate.

For example, I believe it indicated in this particular exhibit that information should be delivered to the computer room by a clerk and returned

to that clerk. There are no sign ins for it that I have received that information or I have sent it back to an individual. So there is no positive control over the passage of information back and forth between the input area and the computer room.

Another area indicates that printouts will be delivered in a sealed envelope to the director of the Bureau of Narcotic Control. You know, here again, if this information is considered very sensitive, then there should be some more positive statement as to how the delivery should be made. In other words, is it sent through the mail? Which obviously would not be proper in this case. Or is it delivered by a guard service, which would be more proper, in that you are dealing with very sensitive information.

Q Were there any other inadequacies in the procedural security of the State's system?

A Just that I think that the manual itself is rather general and vague and does not totally apply to the given application, computer application in this case.

Q Does the manual encompass the protection of data in both written and magnetic form in the way in which you think is proper?

A Only in some cases.

I think the protection of the prescription slip itself is covered well enough in the manual in that it is locked in a vault and must be signed in for and signed out for, but when you get to the data in magnetic form or any printed report generated by the system, there is only -- it's only alluded to that it should be controlled, but nothing definitive as to how one controls it.

Q What would be a proper way of controlling the security of such data?

A No. 1 would be a positive receipt that I have a reel of magnetic tape with confidential information. It is received by somebody in the Data Processing Department.

It is then processed by him. It is then returned, and again positive receipt for its return. This at least would control the flow of information.

However, I also feel that if the information is considered sensitive in nature that when that information is processed on the computer that a management personnel who is knowledgeable in computer operations be present in the data center at that time to insure that when the information has been processed and a report has been printed that an operator doesn't substitute 4-ply

paper for it and keep two copies of the report for himself, or take that information and make a duplicate copy on a reel of magnetic tape and remove it himself.

Q Are any of those precautions present in the State system --

A No.

Q -- so far as you have observed?

A No.

Q Are there any other inadequacies in the procedural security of the State system that you observed?

A In reviewing the procedures, they indicate that information which is confidential in nature should not be divulged to any outside source. They don't say what's confidential.

In this case, they don't indicate it's the patient's name or the physician's name or the type of drug. It's not specified what is confidential.

It also -- another area is the procedures call for certain areas that are secured areas, in quotes, but they don't specify what they are. They indicate that the vault is a secured area. The vault is where they store the prescription form after it has been converted to magnetic form.

To me another secured area, for example, is

the computer room, is the input area. These are not specified, but again only alluded to in the procedures.

The last comment I have, I guess, in the area of procedural security is that when you design a system, you design a method of inputing information, the way you are going to process the information, and lastly the type of reports that you are going to get from the system. And in doing this, you evaluate at the time of system design what type of controls and security measures you must implement into the system.

In this case, if the patient's name is considered to be sensitive, then that should be encrypted or encoded so that it cannot be printed out unless somebody has basically the ability to decrypt that information.

Q To your knowledge is the patient's name that is recorded on the magnetic tape encrypted or encoded?

A No, it is not to my knowledge.

Q Mr. Wasserman, did you also examine the data security of the State's system?

A Yes, again to the degree which you can walk through and physically observe and read from the various exhibits that were made available to us.

In this area, we found a number of problems. First of all, data tapes -- data tapes representing the

information converted to magnetic form with the information about prescriptions and physicians and patient's names, if this information is considered to be very sensitive, it should be stored in a safe or a vault. We were informed that it was stored in metal file cabinets which can be broken into without too much difficulty.

The second area, Mr. Cannizzaro indicated that the hard copy, the printed output would be stored in metal cabinets in his area, and again this should be stored in some type of vault or safe.

The third, at the end of the formal working day, the data converted from a paper document -- in this case the prescription form -- is converted to magnetic form on a disk. This disk is left resident in the machine overnight, if the disk is not filled. Once the disk is filled, the information is removed and put on magnetic tape. The disk that have -- that are partially filled with information should be in a locked cabinet -- or the mini computer basically is what they use, should have the capability of having that particular disk locked.

Q Will you go on with your description of the inadequacies of the State's data security with respect to the triplicate security information?

A When a data tape, a tape with information

is to be recycled, which is basically written over, it's supposed to be degoused, degoused being the erasing of information in magnetic form.

The State of New York does have degousing equipment. However, they never test the tape to make sure that the information has been erased. And they could be putting tapes back into process that do have -- that does have information on it.

The next point as far as I can determine there are no formal procedures for shredding printouts. Security procedures indicate that when there is a large volume of confidential printouts to contact OSA, whoever that is. I'm not sure who they are.

However, when you are printing out a report in a computer room, you may print five or six pages and decide that the print ribbon has to be changed because the reports coming out are too light. Therefore, rip off the first five or six pages and just throw it in a trash can. So there is no positive procedure for destruction of hard copy here.

I already covered two other points, and that is the delivery of tapes to and from the input area to the computer room and back. That should be positive receipt.

Also the same thing would hold true for any printed report, should be signed for, as received.

I also discussed management's responsibility in being present when confidential data is being processed to be sure that it is not duplicated, to be sure that somebody is not introducing an extra copy of a hard copy.

The other area is that on every prescription form the name of the patient appears. This means that all clerical personnel who code these forms as well as all the key to disk operators who convert the data from its paper form to magnetic form will be looking at the individual names. This means that if my name appeared there as using a particular drug, why that individual would know about it, could tell my friends. You could compound that into government officials or famous athletes or movie actors or what have you, that this becomes knowledge that this particular person does take a drug.

The last area really in data security is one of going back to the design of the system. And that is when one designs a system as I indicated earlier, one also designs the output, the anticipated output of the system.

And in this case, I can only determine that a few reports have been designed. And from what I could gather discussing this with representatives of the State of New York that they really don't know in total what information they are going to really want from the system. And unless you do this at its initial stage, then I don't think you can implement the necessary security that is required in a system.

Designing security measures after the fact is costly and quite often totally overlooked.

Q Does that complete your description of the inadequacies in the data security of the system maintained by the State?

A Yes.

Q Have you at my request read Exhibit 29 in this case, which is the audit report on financial and operating practices of the New York State identification and intelligence system?

A Yes, I have.

Q Directing your attention to pages 27 through 31 of Exhibit 29, did you notice any similarities --

A Yes.

Q -- between the criticisms that were made by the State auditor of the intelligence identification

system and the deficiencies that you observed in the system of the Department of Health?

A Yes.

Q What were those, Mr. Wasserman?

A The State of New York auditors indicate a weak physical security posture. And I think basically the physical security is somewhat weak in the medical system we're talking about.

Also that there are -- is no security officer which is a point I really didn't bring up. There isn't a security officer. As far as I could determine, there is nobody trained in security for data processing which is entirely different than other aspects of security.

There is no positive screening of personnel coming in and out of the center is another point that's made here. The potential weakness because they are in a building which is not totally secured, not totally occupied by themselves. And that their employees also do not receive stringent background checks is another point that's brought out in this report.

This report also indicates a problem of controlling keys for access to the building. This is an area that we did not look into. So I could not

comment on that.

We did not visit the building after hours. We were escorted through the building. So I can't say that what we saw was the normal every day working of the center.

They also indicate a form of positive identification, a badge system be instituted as well as a card-key system be instituted.

Q You made both of those observations with respect to the Department of Health system, too, did you not?

A Yes.

Also, they indicate that there is no formal training program for all employees in the area of computer security, and this would also apply to the particular system that I looked at as far as I could determine that there isn't a formal set of procedures, a formal program which is not only given to all employees upon their arrival, but also given to them on a periodic basis.

Security in a data processing environment is not the only normal form of security that you'd find in a large warehouse where you store inventory. It's different in that a great quantity of information can be stored on a very small reel of magnetic tape which one

could put under his overcoat or just put in his briefcase and walk out of the center with. It's not like you are moving a refrigerator.

Q Did you observe whether any of the information that is kept at the Department of Health's computer center is on-line as distinguished from off-line information?

A At the center, we were informed that the Burroughs 3500 which is the type of computer that they have has various on-line applications.

Q Before we go any further, will you define on-line and off-line?

A On-line gives you the ability to acess a computer from a remote location and either update, read or create a record.

Q Would this be done, for example, by telephone?

A It is done on a terminal which is interconnected by telephone lines.

We were informed that when the prescription system is run that it is run off-line, which means that no terminal can access that particular information.

Q About how long would it take to convert the off-line system with respect to triplicate prescrip-

tion information to an on-line system?

A A week, two weeks, at the most, depending upon on how good their on-line system really is. It shouldn't be anything of any great difficulty inasmuch as they already have the capability.

Q Have you reached a conclusion as to whether the physical procedural and data security of the State's system is adequate?

A Well, in my opinion, I believe it's below average compared to other computer centers that I've been in over the last 15 years.

Q Would you say that it is adequate or inadequate?

A Inadequate.

Q In your view, is there a substantial risk of unauthorized disclosure of the triplicate prescription information that is maintained by the State at that computer center?

A Yes, from both intention and unintentional.

MR. LESCH: I have no further questions.

(Short recess.)

EXAMINATION BY MR. FOGARTY:

Q Mr. Wasserman, when you went to the facility

at Albany, were arrangements made for you to go there?

A Yes, they were.

Q By whom?

A From the State of New York?

Q Whoever made it.

A They were made by these offices, Mr. Lesch's offices. And we were taken through by Dr. Baker and some of his staff.

Q So that you just didn't walk into the building, did you?

A No, we were escorted.

Q It was actually done in accordance with either a court order or a stipulation between counsel?

A Yes.

Q So that you don't really know that the way that you went through anybody else would go through, do you?

A Well, we were escorted through.

Q But you have no reason to believe that if you had just walked up there, you could have walked through?

A Well, in my opinion, I think we probably could have.

Q But you have no reason to believe that?

A The only reason is based on my experience with locations like that in the past.

Q Have you ever inspected a data system which you found totally secure?

A No, I don't believe there is anything totally secure. I think that there are many that are quite good, though.

Q As far as printouts, you said that possibly the tape, printing tape be changed in the machine.

A I gave this as an example, that when one prints a report, occasionally the tape that is used to print, the ink in the tape becomes very light, and, therefore, the operator takes that tape off and replaces it, takes the reports that he has and just throws it in a trash can.

Q Did you observe this to happen?

A No, I did not.

Q Do you have any reason to believe that it happened at the State Health Department?

A I don't see that the State Health Department is any different than any other center. This is only one example of what may occur there. There are a number of other examples that I could give.

MR. FOGARTY: No further questions.

MR. LESCH: Off the record.

(Discussion off the record.)

(Time noted: 3:05 p.m.)

_____

Subscribed and sworn to before me

this____day of_____, 1974.

C E R T I F I C A T E

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, WILLIAM BLITZ, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That JOSEPH JULES WASSERMAN, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 18 day of December, 1974.

William Blitz
WILLIAM BLITZ, CSR

December 4, 1974 30A

I N D E X

WITNESSES

PLAINTIFFS'	EXAMINATION BY	PAGE
Joseph Jules Wasserman	Mr. Lesch	3
	Mr. Fogarty	27

EXHIBITS

PLAINTIFFS' TRIAL		FOR IDENT.
41	Resume of Joseph J. Wasserman consisting of four pages.	

oOo

BEST COPY AVAILABLE

31

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

RICHARD ROE, an infant, by ROBERT ROE, his parent, JOHN DOE, an infant, by MARY DOE, his parent, JAMES MOE, an infant, by MICHAEL MOE, his parent, JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHNIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

-and-

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Additional Plaintiffs,

-against-

HOLLIS S. INGRAHAM as Commissioner of Health of the State of New York,

Defendant.

INDEX NO. 73 CIV 1303 (RLE-3 Judge Court)

- x

Continued deposition of JOSEPH JULES WASSERMAN, a witness, taken by plaintiffs pursuant to order, at the offices of Messrs. Shea, Gould, Climenko & Kramer, 330 Madison Avenue, New York, N. Y. 10017, on December 6, 1974, at 3:00 p.m., before William Blitz, a Certified Shorthand Reporter and Notary Public of the State of New York.

APPEARANCES:

Messrs. SHEA, GOULD, CLIMENKO & KRAMER,
Attorneys for plaintiffs,
330 Madison Avenue,
New York, N.Y. 10017
BY: MICHAEL LESCH, ESQ.,
JOHN PREEFER, ESQ., Of Counsel
-and-
SOLOMON Z. FERZIGER, ESQ.,
1345 Avenue of the Americas,
New York, N. Y. 10019

LOUIS J. LEFKOWITZ,
Attorney General,
State of New York,
2 World Trade Center,
New York, N. Y. 10047
BY: MICHAEL P. FOGARTY, ESQ.,
A. SETH GREENWALD, ESQ.,
Assistant Attorney Generals

Messrs. NORWICK, RAGGIO & JAFFE,
Attorneys for additional plaintiffs,
2 Pennsylvania Plaza,
New York, N. Y. 10001
BY: MILES JAFFE, ESQ.,
Of Counsel

ALSO PRESENT:

AMBROSE P. DONOVAN, JR., ESQ.

oOo

J O S E P H J U L E S W A S S E R M A N, recalled as a witness by the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

EXAMINATION BY MR. LESCH:

Q Mr. Wasserman, were you present yesterday and today during the entire testimony of Mr. Cannizzaro

and Mr. Bonacci?

A Yes.

Q Did you listen to all that testimony?

A Yes.

Q Does that testimony with respect to certain changes in the security system that has been established by the State change your conclusions as to the adequacy of the security system?

A No.

Q Will you explain why with respect to the data security, the physical security, and the procedural security in your view the State system is still inadequate?

A Well, starting from the physical security, I feel that the physical security of the building itself is quite suspect inasmuch as the computer operations is manned on a three shift, seven day basis, and apparently there are many keys to the building distributed among various employees. Plus the fact that there is no guard monitoring people coming in and out of the building.

Therefore, hard copy, tapes could possibly be removed from the building, completely unobserved by anybody.

I don't consider the procedures instituted over access to the input area-output area and the

computer room as adequate. When we assign somebody a supplementary type of function, such as sitting at a desk to insure that people sign a log to gain access to the computer room, this type of security meansure is quite suspect in my mind.

The individual obviously is working on other areas, other functions that he has, leaves his position, and anybody at that point can then walk into the center.

It's also been my experience, and one of the tests that we make in doing some of our security work, is to try to gain access to computer centers. And when you have this level of security that has been established at this location, access is generally easily gained as long as you look like you belong there.

Q Do you have any other comments with respect to the physical security that are occasioned by the testimony of Mr. Cannizzaro and Mr. Bonacci?

A Still in the area of physical security, the second door to the input-output area was described as a Dutch door where only the top is left open, at times for ventilation purposes. When we were there the entire door was left open.

Also, when we were at the facility, some-

body entered from the hallway into the computer room, thus negating the fact that that door is locked at all times.

I still feel very strongly that a formal set of controls be established over access to the area, again such as a card key system, a cipher lock system, which would require a positive act on the part of the individual to gain access to the computer room.

I also feel --

Q What do you mean by a cipher system?

A A cipher system is a small device with ten keys on them, and you punch in a code, predetermined code which allows you to gain access.

Even this is not the greatest security, but certainly better than what exists.

The most positive type of security that could be established at a center like this is referred to as a badge exchange system.

Q What is that?

A When an individual tries to gain access to the data center, a guard controls the access. Once the guard observes the individual and communicates with him -- and that's generally through some type of communication system -- it's not face to face -- he will

then allow the individual into an enclosed area.

If the person is authorized to gain access to the data center, he exchanges his ID card for a special badge, and that badge has to be worn in a visible location on the individual's person. This also provides the ability to look around a data center and see if anybody does not have a badge. If they don't, then they are challenged and removed.

Q Have you ever had experiences in connection with data centers where the management has made the statement that everyone is responsible to see to it that no unauthorized personnel are on the premises?

A Yes.

Q What is generally the result where that is the case?

A The result is twofold:

No. 1, where a company has a formal training program, has a formal set of security procedures setup in a manual, specifically designed for security, and that this manual is periodically reviewed, either on a quarterly or semi-yearly basis, and is reviewed with all new employees prior to their being allowed access, this form of control can be very effective.

In the case where companies describe their

security in written form, give it to the individual and let him sign a piece of paper, the security falls flat.

Q Would you say that the State system falls within the first category or the second category?

A The second category.

Q Have you completed your description of your comments with respect to the physical security?

A Yes.

Q Having heard the testimony of Mr. Cannizzaro and Mr. Bonacci, what are your observations with respect to the procedural security of the State's data system?

A Well, my feelings are the same as they were initially, in that again it's an area where it is inadequate.

To start with, there seems to be a great deal of confusion on the part of both of the witnesses as to what is involved in a civil service type of background check, though both are civil servants and have already been subjected to it.

Certainly there should be an awareness of what kind of information was filled out on the particular forms that they did prepare for the State. And, therefore, it's my opinion, that unless there is an on-going program of checking the background, checking credit,

drug checks, that this particular statement that the civil service checks the background of people is inadequate, and in all probability is quite ineffective.

Q Do you have any comments with respect to the use of temporary personnel in an area where the confidentiality of data is supposed to be maintained?

A That's a very dangerous situation because temporary help, especially in clerical processing type functions, are generally not of the highest caliber, or I should say maybe in many instances are not of the highest caliber, in an area that is again really suspect as being a serious deficiency in the current set of procedures or I really should say the fact that there are no procedures makes it a serious problem.

Q Have you looked at Exhibits E, H, M, I, J, K, L, N and C?

A Yes, I have.

Q Is that what you would consider to be an adequate security manual?

A Definitely not.

First of all, they are just sort of issued haphazardly. To me, a security manual has a certain continuity, defining, for example, access to the building, No. 1, who is allowed in the building, who should be in

there, what security measures they have in the building itself.

It should also outline various areas of the building.

When you get down to the data processing side, then I think it has to be established in a logical flow. First of all, what is the rationale for the handling of input media. Secondly, what level of security control should be instituted over the processing of data once it's been converted to magnetic film, and thirdly, the output of the system, again controls and security measures to be instituted there.

Not only is the document sort of haphazard, I really don't see any great continuity, and to be passing documents like this out to your people, I think it may even create somewhat of a confusion, or it could entice somebody to decide he wants to look at everything to see now what is he doing, curious seeker type.

This has to be definitive, has to tell you why, why you are establishing levels of security over processing information. And other information that you may not have security on, it should be defined as such.

Q You heard the testimony of Mr. Bonacci to the effect that there is no encrypting of patient names.

Would this be a difficult procedure to effect?

A No, there are encryption programs, computer programs that could easily do this. However, you must realize that in order for something to be encrypted, it still would pass through the clerical processing with the patient's name on it.

And it would only be encrypted when that information was put into magnetic form.

Q But this would be a safeguard of the information when it was in magnetic form, is that correct?

A Yes, that would be a safeguard.

Q By the way, where is there a greater danger of unauthorized disclosure of the information, when it is in the raw prescription form in Mr. Cannizzaro's office or when it is in the computerized form in Mr. Bonacci's office?

A As far as --

Q As far as the likelihood of obtaining information with respect to a particular individual that the curious individual was interested in.

A The easiest, of course, would be in Mr. Cannizzaro's office, the listing of patient names who had received more than a prescribed amount of drugs in a given period of time. That, of course, would be the

easiest because it would be visible to the individual.

The second, of course, is sort of a piecemeal process, and that is that all of the clerks who code or who key this information to disk would have access to names generated on a random basis. It would not be consolidated in any form. And, therefore, any public figure or friend of theirs who they saw a slip come through, they would know that they would be taking drugs.

The area of data processing is probably the most -- it is the most, I should say -- vulnerable area as far as somebody obtaining everybody in the State of New York who has had any form of drugs, because here we have stored in files a great quantity of data which is actually the history by an individual of all the drugs they have taken, and in this case I believe it will be for five years.

Now the information, of course, is on a reel of magnetic tape or would be on reels of magnetic tape, because I believe at the end of five years based on the figures testified to approximately 125,000 prescriptions per month, the final would be in the magnitude of somewhere in the neighborhood of 7-1/2 million prescriptions, which would be accumulated over a five year period.

Q Can such a reel easily be removed from the premises?

A Oh, certainly. In an attache case, under somebody's raincoat. It could be put in an envelope and mailed to somebody. There are numerous ways that a reel of magnetic tape could be actually taken from the premises.

Q Could that reel then be read by any other Burroughs 3500 computer?

A It could be read by any other Burroughs 3500 computer, or it could be read by any other computer, if there was a conversion program, a program which would convert the Burroughs 3500 tape to a tape which was compatible to that hardware.

Q Do you have any other comments on the procedural security matters that were testified to by Mr. Bonacci and Mr. Cannizzaro?

A I've already stated my feelings about a security manual. There is none.

Q Turning to data security --

A There is still a comment or two.

Q Excuse me. Going back to --

A Still on procedural security.

Q -- procedural security, what further comments do you have on that?

A An area that concerns me is the security of the data tapes with the information about all the people and doctors who have prescribed drugs. Now, these tapes are retained in a metal cabinet as I indicated before, and I feel that this really should be a secured vault, such as is used for the prescription forms.

If anything, the prescription forms might be in a metal cabinet, but certainly the tapes with all of the information, all of it, should be retained in a vault.

I also feel very strongly that the procedure should indicate that the hard copy of reports should be retained again in a vault.

I also feel that the program tape itself which has the various programs for the prescription system should also be retained in a vault when not in use.

Q Does that now complete your comments on the procedural security?

A Yes.

Q Will you tell us why the data security as testified to by Mr. Cannizzaro and Mr. Bonacci is inadequate?

MR. FOGARTY: Objection to the form of the question.

A Again in data security, we're talking about the physical storage of data in its magnetic form, the hard copy, the fact that it is not stored in a vault, that it is stored in a metal cabinet which can easily be broken into, and also another interesting observation, you can sometimes use a key to a comparable cabinet and get into it, whether it is in your office or you are in an office 3,000 miles away, as long as the cabinet has been made by the same manufacturer. We've had a number of experiences in that.

The fact that there is still in my opinion no formal procedures for shredding printouts, that I believe --

Q What do you mean by a formal procedure for shredding printouts?

A Let me look at the defendant's exhibits and I will tell you.

Exhibit K, Item 3(a) entitled "Small Volumes," this has to do with printouts. Tear off heading which identifies data and dispose of it separately. Tear and mutilate listings so it is not easily readable. Dispose of it with usual paperwaste.

To me, anything that's confidential should be shredded. That kind of procedure to me is totally

inadequate. To tear something, I can tear it in half and then just piece it back together again.

Q Would you go on with your comments with respect to the data security of the State's system?

A As far as data processing operations are concerned, inasmuch as there is so much concern over handling some of this information and keeping at least the prescription forms in a vault, to me when any report is prepared with the patient's name on it that there should be due control over the computer operations. By due control, I mean that a representative of management, and in this case probably it would have to be Mr. Cannizzaro, be present in the computer room when this listing is run, take the listing off the machine himself, so that no one else is exposed to any of the patient names in that area.

I also feel that because of the amount of sensitive data processed here that the memory of the computer should be zeroed out after the processing of the prescription system information. This would insure that none of the information that has been processed has been left in the memory unit of the computer.

Q What do you mean when you said the memory would be zeroed out?

BEST COPY AVAILABLE

A It's a routine to erase everything in the memory of the computer. If you were to access the memory after a particular function, you would find what had happened with that data still stored in the memory.

This is a standard Defense Department procedure. DOD has extensive procedures on how to handle confidential or top secret data.

It also seems to me that there only seems to be procedure that really relate to the drug system, and I am somewhat amazed that there aren't procedures for other information that would be considered confidential.

MR. FOGARTY: I move to strike the last portion of his answer with regard to other information.

Q Will you continue.

A That would be the balance of data security. I do have a few other general observations.

Q Go ahead.

A One of my concerns is the fact that there is not an on-going program for computer security at this location. And by instituting an on-going program, this will assist people in not forgetting that they are working with confidential data.

An on-going program in security also would affect those new hires or temporaries or non-New York State employees who have access to the various secured areas of the building.

It's been my experience that if you don't have an on-going security program which would be conducted by people who have been formally trained in this field, that security will be forgotten by the individuals at the location.

Q What do you mean when you say formally trained?

A By formally trained, there are a number of seminars that are conducted, in some cases by the computer vendor that can be available in the commercial market that instruct the person for a three to five day period on the problems of computer security, and the problems of computer security are generally broken down into three classifications: The physical aspect, the procedural aspect and the data security.

They've also recently included another aspect and those are threats, what type of threats can you expect.

Q Do you have any further observations with respect to the three types of security of the State system?

A I guess the other comments I have is to the effect that I guess the prior two witnesses seem to be somewhat confused as to really what level of security did exist at the center.

Q Why do you say that?

A For example, I believe a question asked of Mr. Cannizzaro yesterday was a question to the effect are there any signatures for receipt of the prescription reports, and his answer was no, and yet one of the exhibits that we saw did refer to a signing off on the receipt of the prescription reports.

Q Mr. Wasserman, do you consider the computerization of large amounts of information as a threat to the privacy of the individual?

MR. FOGARTY: Objected to.

A I certainly do.

Q Will you tell us why the computerization of information in your opinion constitutes a threat to privacy?

MR. FOGARTY: Objection.

A The computerization of information in this particular case means that large quantities of data will be stored on a few reels of magnetic tape which would give you the entire history of the pattern

of, in this case, taking drugs of the people in the State of New York. And again on several reels of tape, we could have any person who has taken drugs over a five year period. And this information obviously can easily be taken out. In its paper form it becomes more difficult because one would then have to go through 7-1/2 million forms and collate this information in order to get a pattern, for example, on an individual.

Q Mr. Wasserman, did you hear Mr. Bonacci testify that he did not consider the computerization of information such as the triplicate prescription information to constitute a danger to the privacy of the individual?

A Yes, I did.

Q In your view, if an individual who does not recognize this danger is in charge of computerized information, does that in itself have an affect on the ability to maintain the confidentiality of the information?

A It certainly does.

Q Will you explain why?

A Because that person, whoever he may be, or she may be, is not going to be thinking about securing information. He is going to be concerned about productions and budgets and personnel reviews, and not concerned

about the problem of privacy or security or controlling that particular data, unless it's being emphasized by their management.

MR. LESCH: That is all.

EXAMINATION BY MR. FOGARTY:

Q Mr. Wasserman, with regard to your concern for privacy and the invasion of it, I think you said that there were massive amounts of information and that the concern should be rather with the tapes than with the prescriptions themselves.

Is that a fair statement of what you said?

A No. I'm saying that one can obtain massive amounts of information from the tapes versus only information on a piecemeal basis with the prescriptions. Certainly there should be security over the prescriptions.

Q Do you know whether the same information is contained on the tape that is on the prescription?

A According to the Exhibit F which lists the patient's name, doctor's identification, drug code, pharmacy code, date the form was filled out, date the prescription was filled, batch number and serial number, I think that's quite a bit of information, unless the report is fictitious.

Q Would you take the first name on there,

please, Mr. Wasserman.

A The name is Aaron.

Q What else?

A Initial Z. His age is 47. His zip code --

Q Where does he live?

A He lives in a zip code area.

Q Which one?

A Zip code 10970.

Q Where is that?

A Beats me.

Q What is the name of his doctor?

A Doctor has code D with a number on this report. However, there are other reports with the doctor's name on it.

Q What is his doctor's name?

A It doesn't say on this report.

Q Where is his doctor?

A Also does not say.

Q What pharmacy did he fill the prescription at?

A It doesn't give the pharmacy's name either.

Q Do you know the location of the pharmacy?

A Not on this report.

Q When was the prescription filled?

A When was the prescription filled?

There is no date for Mr. Aaron. That would mean that it was filled by the physician.

Q It would?

A Well, then the form was not filled out properly. Because on all others it indicates the date filled out.

Q Let us take one with a pharmacy.

Mr. Abbey or Abbey R. Abbey is the name, R is the initial. It was filled out on April 24, 1974 and again on May 21, 1974.

Q Where?

A It doesn't indicate the name of the pharmacy on this report.

MR. JAFFE: I would like to ask that the reference to the names be struck from the record.

MR. FOGARTY: Fine.

MR. JAFFE: They can be referred to by initial or by the number on the page.

And I think that should be done by agreement to strike it clean from the record.

MR. FOGARTY: All right.

THE WITNESS: I will refer to

this one as No. 3. The first one would be No. 1 that I referred to.

Q Mr. Wasserman, from what you have just told us, what do you know as a result of this computer information?

A I know a person working -- living -- sorry -- living within a certain zip code has taken a drug.

Q What drug?

A I can't tell you because I don't have the code identification which is on another report.

Q It is on another report?

A I believe or it would be in your procedures as to what the codes are. In order for this particular form to be prepared, the original prescription must be coded with that code for that particular drug.

Q So with this report, in order to make it meaningful, you are going to have to burglarize more than one part of this operation, aren't you?

A Not necessarily.

Q You just burglarized hypothetically the computer information. What are you going to do with it?

A In its printed form. If I happen to live in a given zip code and I know that No. 3 and it's --

Q I am not asking you --

MR. LESCH: I ask that you permit the witness to finish his answer.

THE WITNESS: If I know No. 3 lives in my zip code, I would know that No. 3, whoever he or she may be, is taking a drug.

Q What drug?

A Again, if I have access to the center and get access to the information, or if I worked in that center, the code for the drug would probably be known to me.

Q It would be known to you?

A Certainly.

Q Was there any evidence either from Mr. Cannizzaro or Mr. Bonacci that the clerks who put this information into the computer knew anything about the drugs?

A They certainly would have to know that if a drug was morphine and was coded 01 that a person who had an 01 is getting morphine. They'd have to know both sides. They must know both sides.

Q Would the computer people have to know that?

A Anybody who programmed this, yes.

Q They would have to know that?

A They certainly would in order to write the

program. They would have to know what his 01 is equal to and it would have to be part of programming documentation which is normal standards for any program.

Q The person programming the machine couldn't program it without knowledge of what the numbers specifically meant?

A It could be programmed without specific knowledge of what the code was. However, in order to have proper program documentation which substantiates what the program is doing or is supposed to do, the list of drugs and the related code must be in the documentation. This is a standard, it is an accepted standard in the data processing field.

Q You are saying, Mr. Wasserman, that a machine cannot be told to bring out all information with regard to No. 1, with regard to, say, drug No. 5 or his use of No. 5 without that machine knowing what No. 5 is?

A The machine does not know what No. 5 is. The programmer who programs the machine must know what No. 5 is.

Q Why must he?

A In order to write a program, and in order to document it so that if anything were to happen. For example, if a set of conditions occurred in the computer

at a given time, and the program ceased to run, somebody would have to come in and fix the program. Without the documentation, this would be totally impossible.

Q You are sure of that?

A I'm positive of that.

Q The programmer then must know what every digit on this sheet means, is that correct?

A Yes, in order to write a program to come out with this report obviously he'd have to know.

Q Would anybody other than the programmer have to know?

A The people who encode the prescription with a code number for the drug would have to know.

Q They would have to know every code number on the sheet?

A No.

Q They simply would have to know the code number for the drug being prescribed?

A In order to code the document so that it can then be key punched.

Q So that's two places where part of the information would be, correct?

A That is correct.

It would also be known in Mr. Cannizzaro's

group. In order for them to interpret the report, they would have to be aware of what the codes represented as far as the drugs are concerned.

Q As Mr. Cannizzaro testified he is the one who interprets those reports, did he not?

A He did not.

Q He didn't?

A He also said his clerk interprets the reports.

Q You have a different understanding of his testimony than I do, but be that as it may --

A I may be wrong, but I was under that impression.

There would also be various management people throughout this department who would know what the codes are, such as Mr. Bonacci.

Q Mr. Bonacci knows what these codes are?

A I'm sure he must know what they are.

Q Did he say that?

A He did not say it, but I would assume that he --

Q But you are jumping to the conclusion that he does?

A Well, if I were managing that particular

department, I certainly would know what they are.

Q You would?

A That's correct.

Q Let us suppose that they wouldn't tell you what they meant.

MR. LESCH: Mr. Fogarty, national drug code numbers are published publicly available information as you know and I know.

MR. FOGARTY: There is more than national drug codes on here.

MR. JAFFE: Yes, but you are referring to the knowledge of what the drug is and if it is public knowledge because it is a national drug code, then you would not have to rob anything. You could go to the national drug code and look it up. It's public information. And zip codes are similarly public information.

Q Could you run the computers without the information?

A You can't run a computer without information.

Q I am talking about your personal knowledge of what this printout says. Can the computer be run with-

out your personal knowledge of it?

A Well, the question is one that --

Q No, the question is the one I asked you.

MR. LESCH: I object to the form of the question.

MR. JAFFE: I object to the form.

MR. LESCH: By run the computer, do you mean obtain information from the computer or do you mean put information into the computer or do you mean something else?

MR. JAFFE: In addition to that --

MR. FOGARTY: I would like the witness to answer my question first.

MR. LESCH: I object to the form of your question, but if the witness understands it, he may answer it.

A Assuming that I was in the computer room at the State of New York, I would take the run book which tells you where to mount tapes, how to activate this particular system, and yes, I could run it. Because there should be instructions for an operator and they would be in the computer room for running the prescription system.

Q Would that operator know what was coming out of that machine on a printout?

MR. LESCH: I object to the form of the question.

A He would know the particular application. It would depend on the level of documentation left in the computer room. If there was adequate documentation there, he might know everything. If the documentation was not proper, then he might not know everything.

Q In fact, Mr. Wasserman, as far as the operator of the machine is concerned, this printout can come out and he may not know anything on it, right?

A Well, the recognizable fields on this particular document that we're discussing, Exhibit F, happens to be the patient's name. If the patient were known to him, then obviously he would know that they take a particular type of drug. The type of drug he may not know. The particular document is entitled "Patients With Rx Total Dose In Excess Of 30 Day Supply Processed In The Month Of" blank.

So that he would know that this is an exception report, and that an individual, whether he personally knew them or they were a famous person for one reason or another, political, sports, he would be aware of their name and the fact that they are taking a drug, and they have greater than a 30 day supply of that

particular drug.

Q Would it be accurate to say that he knows that a person with the same or similar name to someone he might know or know of took a drug?

A On this particular report, only if it exceeded a 30 day supply.

Q Fine. And that they had in their possession or were prescribed in excess of a 30 day supply.

A On this particular report that we are discussing, yes.

Q When you were talking about physical securities, you said there were a number of cases of break-ins into areas controlled by keys by people having keys to similar locks thousands of miles away. Would you tell us of some of those, please?

A The reference was being made to standard type file cabinets. We have personally had several experiences, one with a bank in Southern California, where I keep the key to a cabinet from our office, and in jest just tried a cabinet of the same make and it opened. This is a very common type of a problem that is always looked into by people in the security field, when it comes to the protection of vital information, stored in standard file cabinets or supply cabinets.

I think if you checked a lot of your security magazines, you will find that this particular item is generally discussed in writing.

Q What specific cases have you handled involving that?

A We have one with a bank in California.

Q You just mentioned that.

A The second one is with a time sharing company in the Midwest.

And the third with U. S. Naval Audit Service in a job that we did for them at one of their locations.

These are three experiences that I've personally had.

Q Where do the keys come from that open these cabinets?

A In the second two cases, the time sharing company and the governmental agency, they were keys that were at that location that were not supposed to open up these particular file cabinets.

Q They were there?

A They were at the location.

Q They were not 3,000 miles away?

A No.

Q When you referred to zeroing out the memory of the computer, exactly how is that done?

A That is done by introducing into the system a small program which will zero the memory, basically erase the memory. The reason why they call it zero is that's the way the memory takes shape.

Q In other words, you run this program through until you come on the printout with a line of zeros?

A If you went into the memory of the computer and said "Printout everything in memory," you would then come out with all zeros, meaning there was nothing there.

This is a very common security measure, especially in time sharing.

Q What would precede the zeros?

A What would precede them?

The information that was there.

Q How much information?

A Well, it could be, depending on the size of the memory, it could be anything from 4,000 characters of information to as large as the memory is, 248,000, 526,000, depending --

Q How large a memory does the computer of the Department of Health has?

A I'm not sure what the core size is.

Certainly the machine at the Department of Health would have to have at least 64,000 characters or 64K machine, minimum.

Q But that's an assumption on your part.

A It's not an assumption. In order for it to run in an on-line mode, it would have to have to have 64K and in all probability 128K.

Q If it isn't running on an on-line mode --

A It still would have the same thing. You wouldn't cut it off.

Q Does one have to prepare a program in order to get this so-called retained memory out?

A Possibly. It would either be written by yourself, it may be a program that the vendor would supply you as part of his standard programs that he supplies any user, or it could be purchased commercially.

Q But there must be a program?

A That's correct.

Q In other words?

A That's correct.

Q It just does not come out?

A No, sir.

MR. FOGARTY: No further questions.

MR. LESCH: That is all.

(Time noted: 4:10 p.m.)

_____

Subscribed and sworn to before me

this____day of_____, 1974.

362a

C E R T I F I C A T E

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, WILLIAM BLITZ, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That JOSEPH JULES WASSERMAN, the witness whose deposition is hereinbefore set forth (pages 31 to 64A), was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 18 day of DECEMBER, 1974.

WILLIAM BLITZ, CSR

BEST COPY AVAILABLE

363a

Deposition of Defendant, State of New York.

SOUTHERN DISTRICT OF NEW YORK

- x

RICHARD ROE, an infant, by ROBERT ROE, his parent, JOHN DOE, an infant, by MARY DOE, his parent, JAMES MOE, an infant, by MICHAEL MOE, his parent, JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHNEIDER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

-and-

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Additional Plaintiffs,

-against-

HOLLIS S. INGRAHAM as Commissioner of Health of the State of New York,

Defendant.

INDEX NO. 73 CIV 1303 (RLE-3 Judge Court)

- x

Deposition of defendant, STATE OF NEW YORK, by JOSEPH L. CANNIZZARO, taken by defendant pursuant to order, at the offices of Messrs. Shea, Gould, Climenko & Kramer, 330 Madison Avenue, New York, N. Y. 10017, on December 5, 1974, at 9:45 a.m., before William Blitz, a Certified Shorthand Reporter and Notary Public of the State of New York.

List of Changes
Joseph L. Cannizzaro - Transcript
12/5/74

	Location	Change	Reason
1.	Page 19 Line 18	Item 33 to 83	Correction
2.	Page 26 Line 26	Section 33.71 to 3371	Correction
3.	Page 90 Line 18	Section 33.71 to 3371	Correction
4.	Page 90 Line 25	Section 33.71 to 3371	Correction
5.	Page 91 Line 1	Section 33.71 to 3371	Correction
6.	Page 92 Line 10	Section 33.71 to 3371	Correction
7.	Page 114 Line 24	Section 33.71 to 3371	Correction

APPEARANCES:

Messrs. SHEA, GOULD, CLIMENKO & KRAMER,
Attorneys for plaintiffs,
330 Madison Avenue,
New York, N. Y. 10017
BY: MICHAEL LESCH, ESQ.,
JOHN PREEFER, ESQ., Of Counsel
-and-
SOLOMON Z. FERZIGER, ESQ.,
1345 Avenue of the Americas,
New York, N. Y. 10019

LOUIS J. LEFKOWITZ,
Attorney General,
State of New York,
2 World Trade Center,
New York, N. Y. 10047
BY: MICHAEL P. FOGARTY, ESQ.,
A. SETH GREENWALD, ESQ.,
Assistant Attorney Generals.

Messrs. NORWICK, RAGGIO & JAFFE,
Attorneys for additional plaintiffs,
2 Pennsylvania Plaza,
New York, N. Y. 10001
BY: MILES JAFFE, ESQ.,
Of Counsel

ALSO PRESENT:

AMBROSE P. DONOVAN, JR., ESQ.

JOSEPH BONACCI

JOSEPH JULES WASSERMAN

oOo

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties herein, that the sealing, filing and certification of the within deposition be waived; that such deposition may be signed and sworn to before any

officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the officer before whom said deposition is taken.

oOo

J O S E P H L. C A N N I Z Z A R O, called as a witness by the defendant, being first duly sworn by the Notary Public (William Blitz), testified as follows:

EXAMINATION BY MR. FOGARTY:

Q Would you state your name, please?

A Joseph L. Cannizzaro.

Q By whom are you employed?

A New York State Health Department.

Q In what capacity?

A Currently the director of the Bureau of Controlled Substances Licensing.

Q What is your background, educational and work background?

A I graduated from the University of Buffalo, College of Pharmacy in 1942, and was licensed as a pharmacist by the State of New York in 1942, September thereof.

I entered military service at that time

and was discharged honorably in February of 1946.

I went into the private practice of pharmacy and remained there until May of 1947 when I began my employment with the State of New York, Bureau of Narcotic Control, as a narcotic investigator.

Q How long were you a narcotic investigator?

A Until 1959, at which time I was promoted to the position of senior narcotic investigator.

Q What exactly does a narcotic investigator do, Mr. Cannizzaro?

A Basically, he conducts investigations and inspections with regard to the implimentation of the provisions of Article 33 of the Public Health Law of the State of New York, which is commonly known as the New York State Controlled Substances Act.

Q You mentioned Article 33. You are talking about the current law?

A That's correct, sir.

And prior to that, of course, it was two separate laws, Article 33 and Article 33(a).

Q What sort of investigations did you handle?

A The investigations would primarily relate to inspections with regard to applications that were submitted for license, and then any violations or

suspected violations with regard to narcotics and depressant stimulant drugs which are now commonly referred to as controlled substances.

Q During your investigative days, how did the Department become aware of violations or prospective violations, possible violations of the law?

A Primarily through the inspection of pharmacy prescription files, supplemented by information that might be received from various sources, pharmacies, physicians, hospitals, and citizens, husbands, wives.

Q How many narcotic investigators are there in the State of New York?

A At the current time, I believe that there are about 24.

Q They cover the entire State?

A Yes, sir.

Q Are most of them in the City of New York?

A Yes, sir.

Q What was your next position with the Department of Health?

A In 1959, I became a senior narocitc investigator assigned to the New York City office. I think that was in June.

And in November, I was transferred to the

central office in Albany as the senior narcotic investigator. In fact, that was the only senior narcotic investigator position at that time. So that I functioned primarily in a supervisory and administrative capacity in the central office.

Q How long did you hold that position?

A In 1969, I was transferred to the Albany regional office of the New York State Health Department.

Q What position did you take there?

A As a senior narcotic investigator.

Q How long were you there?

A I was there until January of 1974, when I became the acting director of the Bureau of Controlled Substances Licensing.

Q What are your functions in that position?

A As director of the Bureau, I'm responsible for four major programs, the triplicate prescription program, general licensing, methadone maintenance and reports and NC-9 reports or physician-patient reports.

Q You said that you had jurisdiction over the triplicate prescription law.

A I'm responsible for the sales or distribution of the triplicate prescriptions to the various authorized practitioners and institutions, and then for

the receipt and processing of the filled triplicate prescription copies that are submitted by pharmacies and dispensing practitioners.

Q How do pharmacies and dispensing practitioners obtain the forms?

A They submit an application together with the appropriate fee to our unit, and we then distribute the forms to them.

Q Do you keep records as to what forms are dispensed to whom?

A Yes, sir, we do.

Q In other words, you know which doctors have his forms?

A Yes, sir.

Q What is the purpose of keeping that record?

A To keep a very firm control over the distribution of the triplicate prescription forms, to know exactly to whom a given set of forms have been sold or distributed.

Q Of what value is that information?

A Other than the record keeping aspect of it, it enables us to follow-up in situations where forged prescriptions are involved or any deviation from the statutory requirement is involved.

We will always know to whom that particular prescription document was furnished.

Q When the doctor writes or prescribes a Schedule II drug and uses a triplicate prescription, what exactly happens from the moment he writes the prescription?

A When he executes the prescription, it's executed in triplicate. If the prescription is to be filled by a pharmacy, he snaps out the form which releases the original and third copy and he gives that to the patient.

The patient takes those two copies to the pharmacy where the pharmacy fills the prescription, keeps the original copy, after he has made the required notations thereon, and submits the third copy to the State Health Department -- that would be to our particular bureau -- by the 15th of the month following the month in which the prescription was filled.

If it is a dispensing practitioner, that is, where the practitioner dispenses the medication to the patient, he snaps out the form and submits the original and third copy to our Department as the pharmacies have by the 15th of the month following the month in which he dispensed the medication to the patient.

Q You said as the pharmacies had. The pharmacy does not send you the original prescription, do they?

A No, sir, they keep the original on their file.

Q In other words, your reference was to the third copy?

A In the case of the pharmacies, yes, sir.

Q What happens to the third copy of the prescription when you get it?

A In those instances where it is submitted by pharmacies, they enter -- when they are received, they enter our regular processing procedure, which means that they are taken out of the envelopes by the processing clerks, setup in a file, face up and in order as received, and are then coded and edited and batched and ultimately sent to the Data Processing Unit.

In the instance where it is dispensing practitioner, the first thing that is done is the removal of the third copy of the prescription, because he submits the first and third copy, and that third copy is shredded and then the original prescription is processed along the same manner as the prescription copy submitted by pharmacies.

Q Who does the sorting of the prescriptions?

A The supervising prescription clerk has the overall responsibility for overseeing that operation.

The prescription batch and edit clerk will open the envelopes and arrange them in trays as received, first in-first out.

And then they are turned over to the coding and editing clerks for their routine processing.

They are then thereafter placed into batch and entered into a batch log logbook by the supervising prescription clerk, after which they are logged out to Data Processing Unit and logged back in from Data Processing Unit and placed in our security vault.

Q When you send the prescription forms to the doctors, is there any type of return envelope sent with them?

A No, sir.

Q In other words, they submit them in their own envelopes?

A That's correct, sir.

Q And they are told what address to send them to?

A Yes, sir.

Q Directing our attention to the building

in which you are located for the moment, where is the building?

A The address is 845 Central Avenue, Albany, New York.

Q Where physically is it?

A It's located to the rear of 855 Central Avenue, which is an office building and adjacent to 875 Central Avenue which is an office building, I believe primarily occupied by the -- a unit of the State Motor Vehicle Department.

Q The building in which you are located, are there any occupants of that building who are not employed by the State of New York?

A No, sir, I don't believe that there are any other occupants. I think the building is occupied solely by the State Health Department and the State Department of Commerce.

Q After the prescriptions are sorted, what happens to them? These are original prescriptions we're talking about, correct?

A They will be the original copy in the instance of the dispensing practitioner. They will be the third copy in the instance of those prescriptions that have been filled by pharmacies, the pharmacies

retaining the original prescription.

Q They are both treated the same?

A That is correct, sir.

Q What happens to them?

A In the processing by the processing clerks, they scan the prescription to make certain that the practitioner's BNDD number is located.

Q What is the BNDD number?

A That is a number that is assigned to a practitioner upon application by the drug -- Federal Drug Enforcement Administration, which authorizes the prescribing of controlled substances by that particular practitioner.

Q What does BNDD mean?

A That is an acronym for Bureau of Narcotics & Dangerous Drugs, which is now identified as the Drug Enforcement Administration.

The next thing that is done in the coding and editing process is to sort of clarify if it is necessary the total quantity that is prescribed on the prescription and edit that in a special manner, if it needs editing, and the same thing with the maximum daily dosage. They also check and will clarify the pharmacy, the pharmacy BNDD number, as well as the NDC number of

the controlled substance that has been prescribed, if it is on our special list of controlled substances. Otherwise, the NDC number remains untouched.

That is the essence of the --

Q That finishes the sorting clerks --

A Operation.

Q Where are these clerks located?

A They are located in our security area which is separated from our administrative area, and within this area they operate behind a security fence.

Q What kind of a fence?

A It is a chain link fence that runs from floor to ceiling.

MR. LESCH: May I have the last two questions and answers read back, please?

MR. FOGARTY: Surely.

(Read record.)

MR. LESCH: Off the record.

(Discussion off the record.)

BY MR. FOGARTY:

Q How many clerks are in there?

A Nine.

Q Are they civil service employees?

A They are all civil service employees with

the exception of two temporary service clerks that are hired through our personnel office.

Q As to the civil service employees, what type of investigation is made before they are hired?

A I believe it's the usual type of investigation that's conducted with respect to all State employees. I do not know the complete nature of that.

Q Do you know anything about it?

A I believe there is an investigations unit within the Civil Service Department itself. I know I was subjected to it myself.

In other words, anything that you state on your application is subject to being verified and checked upon, your application for State employment.

Q Is there any investigation made outside the department?

A I do not know that, sir.

Q You get the prescription coded, edited. What happens to it then?

A They are placed in batches by the supervising prescription clerk, and they are given a sequential number, and then placed in cabinets that are identified as to be key punched.

When the Key Punch Unit notifies our

department -- our bureau that they are ready for an additional supply of batch prescriptions for key punching, the supervising clerk extracts the batches, which average approximately 50 a day and logs them out to the Key Punch Unit.

When they are through with the processing, they notify her and she picks them up and logs them back into our batch record book and places them in cabinets within our security vault in batch number sequence.

Q They are not sent to the key punch operators until you receive notification that they are ready to receive them, is that correct?

A That's correct, sir.

Q Then they are kept locked when they are in your possession?

A Yes, sir, they are kept prior to going to key punch in our security area. After they come back from key punch in our security vault.

Q The security area to which you refer is the area where the coding clerks are behind this wire fence?

A That's correct, sir.

Q Is there any additional security involved with that wire fence?

A There is a central station alarm system that applies to both the security area, the entire room in which the security area is located, and the security vault.

Q Where is the security vault?

A The security vault is approximately about 20 yards from the security area down the corridor.

Q What type of a place is it?

A It's a concrete block wall room with a steel door and lock.

Q The door to this vault area, is it opened or locked?

A It's locked at all times when not in use.

Q Who has keys to it?

A The key is in the direct -- under the direct personal control of the supervising prescription clerk.

Q Is she the only one who has access to it?

A Outside of myself, she is the only one who has access to the key. And if I want it, I have to go to her.

Q Where is that key kept when she is not available?

A It's kept in the security room in a book

attached to the key ring. That's the vault logbook.

Q What kind of access is there to the security room where the prescriptions are coded?

A All of our bureau employees have access to that area in the course of their official duties.

Q How is entrance obtained?

A They may walk in and out of that area through a latch locked gate.

Q Is there anybody supervising their coming and going?

A The supervising prescription clerk.

Q And in her absence?

A The batch and edit clerk, or any other person that I may specifically designate.

Q Do their positions in the room give them full view of the entryway?

A Yes, sir.

Q Is that the only entryway to that room?

A Yes, sir.

May I supplement that?

There is another entry door, but it's never used. It's always kept locked. So it's the only entry-way that is used.

Q Where does the other door go?

A It goes into a supply room to the right of the main entrance of our security area in which we keep, oh, our backup quantities of envelopes and forms, and other supplies.

Q When the triplicate prescription law became effective, did you cause any instructions to be issued with regard to the handling of them?

A I did not, sir, because I was not in that capacity at that time. That became effective April 1, 1973.

Q Were there instructions in effect at that time?

A I believe there may have been, but I'm not aware of them.

Q Is there a manual?

A Yes, sir, we do have a manual that relates to the security of information from unauthorized disclosure.

Q I show you a document entitled "Administrative Policies, Procedures and Forms, Office Practice" dated March 22, 1973, and I ask you if you are familiar with that.

A I've seen this, but I'm not familiar with it.

Q You have seen it, though?

A Yes, sir.

Q I show you a memorandum dated March 8, 1974, and ask if you are familiar with that.

A Yes, sir, I am.

Q What does that relate to?

A The memorandum is entitled "Confidentiality of Records" and it's a memo from me directed to all non-bureau employees.

Q I show you a memorandum of March 11, 1974. Are you familiar with that?

A Yes, sir, I am. That is a memo entitled "Confidentiality of Records" from me addressed to all employees in the Bureau of Controlled Substances Licensing.

Q What does that have reference to?

A I advised them of their responsibilities with regard to confidentiality and relate specifically to GA Manual, Item 33.

Q Is this the item to which you refer?

A Yes, sir.

Q That is dated --

A February 27, 1974.

And in it they are requested to read it and then acknowledge the fact that they've read it by signing the attached sheet. And that they understand it

and will comply with the requirements as set forth in the GA Manual item.

MR. FOGARTY: I would like the three documents marked Defendant's Exhibit 1.

MR. LESCH: Why don't you call them Defendant's A, B and C.

MR. FOGARTY: Fine. You designate the order.

MR. LESCH: It does not matter to me.

MR. FOGARTY: All right, mark them 1, 2 and 3 in the order I gave them to you.

MR. LESCH: Since ours are marked 1, 2 and 3 --

MR. FOGARTY: A, B and C.

MR. LESCH: Yes.

(Memorandum dated March 8, 1974 entitled "Confidentiality of Records" from Joseph L. Cannizzaro to all non-bureau employees, marked Defendant's Trial Exhibit A for identification as of this date.)

(Memorandum dated March 11, 1974 entitled "Confidentiality of Records" from Joseph L. Cannizzaro to all employees in the Bureau of Controlled Substances Licensing, marked Defendant's Trial Exhibit B for identification as of this date.)

(Document headed "General Administration Manual" dated 2/27/74, Item 83, marked Defendant's Trial Exhibit C for identification as of this date.)

MR. LESCH: Off the record.

(Discussion off the record.)

MR. LESCH: If we were before the court at this time, I would object to the admissibility of any of these documents in evidence. They are not on the schedule of defendant's exhibits.

Moreover, Exhibit C which is the general administrative manual and which was referred to in the schedule of defendant's exhibits that I obtained from Mr. Greenwald, which was inserted into the pretrial order, and which was signed by the Attorney General's Office, referred to specific pages of the record on appeal, the general administrative order that was dated October 16, 1972.

Now for the first time at the trial of this action, I am handed a document that I have never even seen before dated February 27, 1974 and we have received no advanced notice of this document and it is

not even referred to in the stipulation pursuant to which this case is being tried.

I might say that the first time I saw Exhibit C was just a few moments ago when a copy of it was given to me by Mr. Fogarty.

MR. FOGARTY: I would suggest, Mr. Lesch, that you check your records and find out if you didn't get a copy of it about two weeks ago. I think you got copies of all of these documents that I have in front of me two weeks ago.

MR. LESCH: Sir, I got copies of Exhibits A and B.

MR. FOGARTY: If you got A and B, you also got C, because they all came to me together.

MR.LESCH: With a letter from Mr. Greenwald dated June 25, 1974.

I did not get a copy of Exhibit C until this morning.

MR. FOGARTY: I have a different understanding.

MR. LESCH: You may be interested

to see the list that I obtained from Mr. Greenwald which contains what are now Exhibits A and B, but which has no reference to what is now Exhibit C. And I can tell you that I received this list together with his letter dated June 25, 1974.

MR. FOGARTY: What does the first sentence of Paragraph 2 of the memorandum of March 8, 1974 say?

MR. LESCH: I have read it.

MR. FOGARTY: What does it say? What does it refer to?

MR. LESCH: It was never provided to me.

MR. FOGARTY: You said you never saw a reference to it. There is a reference to it right there so I am inclined to think that you had a copy of it.

MR. LESCH: I said that this Exhibit C was never provided to me before, and it hasn't been until this morning.

MR. JAFFE: Furthermore, may I point out that the objection is based on the fact that there is a list of defendant's

exhibits which were submitted in the pretrial order which does not include any of these as I understand it.

MR. LESCH: That is correct. There is no basis for offering these documents in evidence now when the Attorney General's Office signed a pretrial order in which there was no reference made to any of them. The court directed us to submit a list of all our exhibits.

MR. FOGARTY: And our witnesses, I might point out, Mr. Lesch.

MR. LESCH: Yes, that is correct, and our witnesses.

MR. FOGARTY: Right.

MR. JAFFE: I would like to set the record straight on the witnesses. We informed the Attorney General that there was a change in one or two witnesses and no objection whatever was made.

MR. LESCH: Moreover, we explained the only additional witness that was offered by the plaintiffs that I represent was Dr. Fishman, and I explained to the court and the Attorney

General that Dr. Fishman had been away for a number of weeks prior to the Thanksgiving Day holiday and that the first time I heard from him was during that holiday and as soon as I heard from him I advised the court and the defendant that we intended to offer Dr. Fishman's testimony and no objection was made thereto.

MR. FOGARTY: That advice was given on the morning of the trial.

MR. JAFFE: As for the co-plaintiffs, the only witness who was additional was a cancer patient who was initially said to be too sick to testify, but subsequently -- and at that time we notified the Attorney General we might have to take a deposition of that plaintiff, but subsequently his doctor permitted him to come and testify and we so informed the Attorney General.

MR. FOGARTY: Did anybody say anything about your witness?

MR. JAFFE: No. I want to make that clear. There was no objection whatsoever to that change.

MR. FOGARTY: Shall we now proceed?

MR. LESCH: Are you waiting for an answer from me?

MR. FOGARTY: Yes.

MR. LESCH: Sure.

MR. FOGARTY: You are finished?

Okay.

BY MR. FOGARTY:

Q Mr. Cannizzaro, in both of your memos you are talking about confidentiality, is that correct?

A That's correct.

Q Why?

A Because of the confidentiality requirement of the statute, Section 33.71 of the Public Health Law, the GA Manual item that relates to confidential documents and to make all of our employees aware of the fact that these are sensitive documents and that the information contained therein should not be communicated to anyone during the course of their employment with our bureau.

Q In the operation of your office, do you do anything to enforce or to impress this on the employees?

A Yes, sir. Our processing manual contains continual reference to the fact that the documents contain confidential data and should not be discussed with anyone, even among themselves.

MR. LESCH: I move to strike any reference to a processing manual, since there is no such document in evidence. If there is such a document to be offered in evidence, it will speak for itself.

MR. FOGARTY: Would you read back the last answer, please.

(Read answer.)

Q Do you have each employee do anything with relation to this matter?

A Yes, sir.

After reading the GA Manual, Item 83, I believe is the number, they sign a statement to the effect that they are aware of the contents of that GA Manual item which relates to confidentiality of data, and that they will agree to abide thereby.

Q Is this information transmitted to all employees as they are employed?

A Yes, sir.

Q Are they asked to sign the statement?

A Yes, sir.

Q Where are those signatures kept?

A They are kept as an attachment to that particular memorandum that has been previously referred

to here, the confidentiality memos.

Q Have you had any occasion to date where you have become aware of anyone violating this confidentiality?

A No, sir, I have not.

Q With regard to the vault area and the security area, have you got any standing instructions?

A We have a visitor's log to the security area wherein the supervising clerk enters any -- the entry of any person into that area that has authorization to come into the security area.

He also maintains a vault entry log to indicate entry into the vault.

Q What by definition would be a visitor to that area?

A No visitor -- let me put it this way.

Our regular bureau employees have access, may enter into the vault area -- into the security area in the course of there official duties. Also non-bureau employees that have been cleared through our confidentiality memo series. And that again is in the course of their -- only in the course of their official duties.

Anyone else other than -- we -- I think we have a specific clearance for UPS personnel -- must get authorization to enter the security area from me.

Q What does UPS mean?

A United Parcel Service.

And he may not enter the area unless he's under the direct accompaniment of the supervising prescription clerk or the batch and edit clerk or a person I've designated to be in charge of that.

Q Is there a regular procedure setup for his arrival at that building?

A Yes.

I can't recall exactly whether he's making two visits -- two pickups a day or one. I think there is one in the morning and one in the afternoon.

Q He is picking up blank prescriptions? Is that what he is doing, is that it?

A That's correct, prescription blanks.

Q Being mailed out to doctors?

A Being sent out to practitioners.

Q This log, visitor's log that you referred to, where is that located?

A That's located in the office of the supervising prescription clerk.

Q Where is that individual located?

A That's behind the entry gate to our security area, that is, in front of the security fence.

Q But inside the room?

A But inside the room, yes.

Q Immediately inside?

A Her office is to left as you walk in, and adjacent to the security fence area, behind which the prescriptions are processed.

Q Have you written any memos or notices regarding access to these areas?

A Yes, sir, I have.

Q When?

A Back in March of 1974. I think there is a series of three memos, one to bureau employees, one to non-bureau employees, and then one in general with regard to access to the security area and the vault.

And there may be some others. Those are the main ones.

Q I show you a memorandum dated March 18, 1974. Is that the one to which you have reference?

A That's correct, sir. That's entitled "Access to the Vault and Security Area" and it's from me to all employees of our Bureau of Controlled Substances Licensing. It's dated March 18, 1974.

MR. FOGARTY: Mark it Defendant's Exhibit D for identification.

(Memorandum dated March 18, 1974 entitled "Access to the Vault and Security Area" from Joseph L. Cannizzaro to all employees of the Bureau of Controlled Substances Licensing, marked Defendant's Trial Exhibit D for identification as of this date.)

MR. LESCH: Let the record reflect that I object to Exhibit D on the ground that it is not included within the schedule of defendant's exhibits and constitutes unfair surprise.

MR. FOGARTY: Would you care for a recess?

MR. LESCH: At the conclusion of this deposition -- let me see how many more of these you pull out -- we'll make a determination.

Q I notice that this memorandum also contains signatures on an attachment.

A Yes, sir.

Q Are these the people who have access to the areas covered by the memorandum?

A That's correct, sir.

Q The same procedure is followed with regard to this as to the other clerks under your jurisdiction?

A This would be all of our Bureau of Controlled Substances employees.

Q This covers the bureau regulations with regard to the handling of these matters, is that correct?

A We also have a manual -- it's entitled "Security of Information from Unauthorized Disclosure" -- that will in essence encompass the substance of the confidentiality manuals and the access to security area and vault areas that have been previously mentioned here.

MR. LESCH: May we have that question and answer read back, please?

(Read question and answer.)

MR. LESCH: I move to strike the testimony beginning with the words "we also have the manual" on the ground that there is no such manual that has been offered in evidence or provided to us, and that any manual constitutes the best evidence of its contents.

Q Mr. Cannizzaro, I show you an undated document, and ask you if that is what you have just referred to.

A Yes, sir, it is.

Q Is this in effect an amalgamation or bringing together of all of the existing regulations with regard to the handling of triplicate prescriptions

as far as your bureau is concerned?

A Yes, sir, I believe it is.

Q What is the purpose of this?

A This is with regard to triplicate prescriptions.

Q Only with regard to triplicate prescriptions?

A Right.

Q These memos preceded it?

A Yes, sir.

MR. JAFFE: Objection.

Could you clarify for the record what that expression concerning preceded it means?

MR. FOGARTY: Yes, the memos that I am referring to are March 8th, March 11th and March 18th which are Defendant's Exhibits A, B and D.

MR. JAFFE: 1974?

MR. FOGARTY: Yes.

MR. LESCH: Off the record.

(Discussion off the record.)

MR. FOGARTY: Mark that Defendant's Exhibit E.

(Document headed "Bureau of Controlled Substances Licensing, Security of Information from Unauthorized Disclosure," marked

Defendant's Trial Exhibit E for identification as of this date.)

MR. LESCH: With Mr. Fogarty's permission, I would like to conduct a voir dire examination on Exhibit E.

VOIR DIRE EXAMINATION

BY MR. LESCH:

Q Who prepared Exhibit E, Mr. Cannizzaro?

A The copy that you are seeing there was prepared in the Office of Management Analysis.

Q Who in the Office of Management Analysis?

A I believe it's Mr. William Johnson.

Q When did he prepare it?

A I can't give you the exact date, but it was during November of 1974 when all of these procedures were consolidated into that one manual.

Q Was that in preparation for this trial?

A No, it was in preparation for our getting our manual in final shape, final as of that date, let's put it that way.

Q It's not in final shape now?

A As of that date. Because -- there will be, I'm sure, as we review it changes made.

Q As of what date, November, 1974?

A At -- November is when it was prepared,

sometime during the month of November of 1974. A lot of these things were consolidated into one and there were some additions made.

Q Has it been distributed to members of the Bureau of Controlled Substances Licensing?

A No, it has not.

BY MR. FOGARTY:

Q You say that a particular individual prepared this?

A In consultation with myself and with the office of the counsel and under review by the Associate Commissioner of Community Health Services.

The full physical preparation of the document was done by Mr. Johnson or his office.

Q It was not done on any particular day, was it?

A No, sir.

Q About how long did it take?

A Well, from beginning it's taken months, from the beginning. In fact, I think it was in preparation before I came with the Bureau.

Q Are your regulations with regard to the handling of triplicate prescriptions and the storing of them constantly being reviewed?

A Yes, sir.

MR. LESCH: I don't know if I have said this of record, but I also object to Exhibit E on the ground that it is not on the schedule of defendant's exhibits which the Attorney General's Office said it was going to offer in evidence in this case.

So far we have five exhibits, and none of them are on the schedule that was annexed to the pretrial order.

Q As I understand it, Mr. Cannizzaro, this is a vital on-going system which you are supervising?

A Yes, sir, it is.

Q Certain procedures are subject to change?

MR. LESCH: I object to leading the witness.

A Yes, sir, they are.

Q Do you, in fact, change any of the substance or basic purpose of what you are doing?

A No, sir, I do not. Our basic purpose is to maintain confidentiality of the prescription document data.

Q What would be the purpose of any refinements in your system or changes in your system?

A To make it even more secure than it is.

Q How would you become aware that such changes might be indicated or proper?

A It might be something that I might miss. It might be brought to our attention by other units of the department, or in consultation with other units of the department that are also involved with our documents, possibly through outside sources.

If anything comes to our attention that indicates that there is a need for improvement of our security, we will take steps to improve our security.

Q Going back again to the prescriptions themselves, once they go into the computer area, what product do you receive?

A On a monthly basis, we get a series of printouts which relate to the prescriptions that were processed during that particular month. We get these from the Office of Electronic Data Processing.

Q Is that automatic?

A Yes, sir.

Q What authorization, if any, underlies it?

A These were all developed initially under the authorization of Dr. Baker, the Associate Commissioner for Community Health Services.

Q What printouts do you receive?

A We get a series of statistical summaries with regard to the prescriptions that have been processed during the month.

We get one that relates -- identifies the NDC -- the drugs by NDC numbers, and gives us a breakdown as to the practitioner groups that are prescribing that particular item, the total number of those practitioners, the total quantity of the drug that was prescribed, the average per practitioner, total number of prescriptions and the average per prescription.

We get another printout that gives us a breakdown with regard to the total number of prescriptions that were processed during the month identifying -- breaking them down into those that were filled by pharmacies, those that were dispensed by practitioners, and giving us an overall total.

These will be broken down by practitioner group, the total number of prescriptions per practitioner group, number of practitioners prescribing and the average number of prescriptions per practitioner.

We get the same type of breakdown with regard to prescriptions that are being dispensed by practitioners, and then a separate breakdown for the

pharmacies showing the total number of prescriptions filled by pharmacies, the total number of pharmacies involved and the average number of Schedule II prescriptions per pharmacy.

We get another statistical breakdown that shows us the -- it's cumulative. It indicates to us the -- that -- based on the prescriptions that were processed in that given month -- it breaks those down into the numbers that were filled in any given month.

MR. LESCH: May I interrupt?

I excuse myself for doing so. But I know that we have offered exhibits in evidence which are the copies of the printouts that were furnished to us by the Department of Health, and I wonder if it would not be a little clearer for all of us if Mr. Cannizzaro could testify by reference to those exhibits. That is only a suggestion on my part. I'm not trying to try your case for you.

MR. FOGARTY: If the exhibits are here, I will give them to him, the printouts.

MR. LESCH: Are they any different from the printouts which we have already offered in evidence?

MR. FOGARTY: I suspect not, except that there might be updates. There might be later ones, that's all.

MR. LESCH: Rather than confuse the record, why don't you refer to the exhibits that have already been marked as plaintiffs' exhibits so that we don't have o sets. If they are the same exhibits --

MR. FOGARTY: They are the same information.

MR. LESCH: If they are the same basic information, rather than burden the record --

MR. FOGARTY: You were the one who asked for the updates and that's why we got them.

MR. JAFFE: The question is whether Mr. Cannizzaro's testimony --

MR. FOGARTY: I know what the question is. I am talking to Mr. Lesch.

MR. JAFFE: I am part of this.

MR. FOGARTY: I know you are, but I will get to you when I finish with Mr. Lesch. I am not going to talk to both of you

at once.

MR. LESCH: My only point is that there are trial exhibits which have already been marked at the request of plaintiff. If these are updates, they contain significantly different information, then by all means put them in. I might add that when I requested them, I did not expect to see them for the first time at trial. I expected to see them a reasonable time before trial. Apparently, this pretrial order was a one sided document, and that is the plaintiffs had to comply with it and the defendant didn't.

Off the record.

(Discussion off the record.)

BY MR. FOGARTY:

Q I show you Plaintiffs' Exhibits 13 through 21, both numbers inclusive, and ask you if these represent the printouts that you are receiving each month.

MR. LESCH: Is that at the present time?

MR. FOGARTY: The present time. Receiving is what I said.

A Three of these are in the format that we

are currently receiving them.

Q Which three of those?

A Shall I refer to them by the exhibit number here?

Q And the name, please.

A "Schedule II Substances Dispensed and Processed in Month of," and this one is February, and it's Exhibit No. 14.

The next one is "All Prescriptions Processed in Month of," and this is February, Exhibit No. 15.

"Report of Duplicate Prescriptions Processed in Month of February," and this is No. 16.

The next one which is a monthly printout has had a changed format.

MR. LESCH: Let the record reflect that Mr. Cannizzaro is now referring to Exhibit 18.

THE WITNESS: That is correct, sir.

Q What is the title of that exhibit?

A "Patients With Rx Total Dose In Excess 30 Day Supply In Month of February."

Q What is the change in that format?

A There are two primary changes.

No. 1, the patient identity as it exists in the computer is listed on this form, plus there is a spatial separation between the individual patient identities on the printout.

And there may be a change in the location of the column headings. But essentially the information is still the same.

Q In other words, it has not been changed in substance?

A No change in substance other than those items that I mentioned, the one item, patient identification.

MR. LESCH: I object to the "in other words" because I think this is a very substantial change.

Off the record.

(Discussion off the record.)

BY MR. FOGARTY:

Q Mr. Cannizzaro, I show you a copy of a printout and ask you if this is the update of Plaintiffs' Exhibit 18 to which you referred?

A Yes, sir, it is.

May I at this time comment that it does contain patient identities on here, and that I released

this to the office of the counsel with the direct approval of Dr. Baker for transmittal to the Attorney General's Office. And I'm wondering as to the appearance of the patient names on this document as to what --

MR. FOGARTY: I think we can stipulate as to the same thing we did with regard to patient names on the opening day of the trial that the names will not be revealed to anyone.

MR. LESCH: Yes.

May we have the exhibit that Mr. Cannizzaro is now reading from marked as Exhibit F so that the record is clear?

MR. FOGARTY: That stipulation will bind both lawyers and non-lawyers in this room.

(Update of Plaintiffs' Trial Exhibit 18, marked Defendant's Trial Exhibit F for identification as of this date.)

MR. FOGARTY: Off the record.

(Discussion off the record.)

BY MR. FOGARTY:

Q What is Plaintiffs' Exhibit 13? Would you describe it, please?

A It is entitled "Records Added To The Tape,

Practitioner Rx Transaction Record, Edit Error Listing, Asterisk Indicates Error."

And a second part to that is "Records Not Added To The Tape" under the same heading.

Q What exactly does that printout give you in the way of information?

A It indicates to me that of the prescriptions that have been processed through key punching there are a series of them that have errors on them that have been -- our criteria indicates that are not critical, and that those records have been added to the data processing tape file.

And the second one that was entitled "Records Not Added To The Tape," that those prescriptions have not been added to the tape file. The errors there according to our criteria are too serious for them to be entered into the tape record without an adequate follow-up.

Q The substance of this printout has not changed to the present time?

A No, sir, it has not.

These are daily records.

Q You get these every day?

A That is correct, sir.

And may I add at this time that we get one

additional daily record.

Q What is that?

A And that one is with regard to any prescription that is on our lost, stolen file that may have -- that has been filled.

Q You are referring to a prescription, a triplicate prescription which has been reported stolen --

A Right.

Q -- but has actually been cashed --

A That is correct, sir.

Q -- and forwarded to the Bureau --

A Right.

Q -- in accordance with that aspect of the law?

A That is correct.

Q And you get that listing every day?

A That is correct.

Q Do you have an exhibit before you that shows that printout?

A No, sir.

That is a new printout.

Q I show you a printout and ask you if this is a sample of what that lost prescription printout looks like.

A Yes, sir, this is itexactly. It's entitled

"Cashed Rx's Previously Reported Lost Or Stolen."

A When did you start making this printout?

A I think this started sometime in July of 1974 or thereabouts.

Q So that the one you have in your hand was produced when?

A This was received in our office November 20, 1974.

Q It has no prescriptions listed on it, though.

A That is correct, sir.

MR. LESCH: May we have this document that Mr. Cannizzaro is testifying about marked for identification so that the record is clear?

MR. FOGARTY: Yes, we will mark this Defendant's Exhibit G.

(Document headed "Cashed Rx's Previously Reported Lost Or Stolen," marked Defendant's Trial Exhibit G for identification as of this date.)

Q This, Mr. Cannizzaro, would actually be a refinement of Plaintiffs' -- what number are we talking about?

A Well, this is not a refinement. This is a new --

Q An addition to the edit error listing?

A Right.

Once we got the lost-stolen prescriptions into the computer file, we were able to generate this particular printout.

Q Would you refer, please, to Plaintiffs' Exhibit 14?

A Yes, sir, that's entitled "Alphabetic Listing of Practitioner Master File."

Q What exactly does that show?

A It gives the -- identifies the practitioners by their license number, profession code, BNDD number. It gives their purchase, prior purchase record and the order date of their prescription.

This relates to the sale of the prescription blanks and not to processing of prescriptions, of cashed prescriptions.

Q This then is a record of the prescriptions which you have sent to each doctor whose name appears on the document?

A Yes, this reflects -- this reflects the initial order record for each one of these practitioners.

Q In other words, each time he orders prescription blanks, his name will appear on this printout

sometime subsequent to the order?

A That is the way it will ultimately be, but at this time the -- this record reflects only the fact that he has had an initial order processed.

At a later -- the reorders are kept at this point on a manual basis with an adequate record, batch record made for the reorders, and they will ultimately be entered into the computer when that capability is realized.

MR. LESCH: Off the record.

(Discussion off the record.)

BY MR. FOGARTY:

Q Exhibit 14, printout entitled "Schedule II Substances Dispensed and Processed in Month of" -- it says February, but any month.

A There has been no change in that --

Q No change?

A -- printout, sir.

Q Exhibit 15?

A There has been no change in that printout.

Q That's all prescriptions processed --

A In the month of February, for this particular printout.

Q Exhibit 16?

A "Report of Duplicate Prescriptions Processed in Month of February."

There has been no change in the format of that printout.

Q Exhibit 17?

A Exhibit 17 is entitled "Unmatched BNDD Numbers." That we are not receiving at this time. We expect to resume the generation of this printout at a later date when it's feasible.

Q Why aren't you receiving it at the present time?

A We had a problem with it because all of the reorders were not in the computer file. When the reorders are placed in the computer file, we'll be able to make a better utilization of it.

Q Plaintiffs' Exhibit 18.

A I've testified to the changes in that, and I think --

Q There have been changes in format, not in substance, is that correct?

A There has been a change in the substance of it in the fact that the patient identity as it appears in the computer is indicated on the printout.

Q Exhibit 19?

MR. LESCH: The new printout is Defendant's Exhibit F, is that right?

THE WITNESS: Yes, sir.

Q Plaintiffs' Exhibit 19?

A There is no change in that format, sir.

Q Plaintiffs' Exhibit 20?

A No change in that format.

Q Plaintiffs' Exhibit 21?

A No change in that format.

Q There is only one of these printouts which contains a patient name, is that correct?

A That is correct, sir.

Q That would be Plaintiffs' Exhibit 18, is that correct?

A Yes, sir, the format and the substance of that has been changed.

Q That is as prescribed in Defendant's Exhibit F?

A That is correct.

Q What is the purpose of showing the patient's name on that?

A It identifies a patient who has received in excess of a 30 day supply of a Schedule II controlled substance, either from one or more than one practitioner.

Q What is the purpose for printing out this information?

A The law limits the supply that may be prescribed for an individual patient to a 30 day supply of a Schedule II controlled substance in this situation, and this enables us to identify those instances where we have patients who are receiving more than a 30 day supply from either one or more than one practitioner source.

Q Does it have any other use?

A Well, the data that is on the printout may not necessarily reflect -- may not necessarily mean that the patient as indicated on the printout is getting the indicated medication. There may be other possibilities involved that will only be disclosed by an investigative follow-up in some instances.

In other words, there may be some instances that it may be a practitioner -- even though it indicates it is a patient, it may be a practitioner that is obtaining medication possibly for his own personal use.

Q What other types of situations could be involved in the information supplied by this printout?

A In checking some of the entries there, that is, by going back to the original document in the file, the copy document that is in the file, and/or

checking against our lost-stolen list, we have found instances of forged prescriptions. That is, using this as the basic document.

Q Is there any other circumstance it might suggest?

A It also indicates here where a practitioner is prescribing more than a 30 day supply for any given patient, which would exceed the legal requirements.

Q Does it also identify the doctors?

A Yes, sir.

Q Or doctor from whom the patient has gotten a prescription?

A The printout identifies the patient, the doctor by BNDD number, the batch number location of the prescription, the serial number of the prescription, the NDC number of the drug, total quantity prescribed, the maximum daily dosage, the pharmacy where it was filled, the date prescribed, date filled.

Basically just about all of the data that's on the prescription document.

Q So that it might also show or indicate violations or possible violations by a doctor or by a pharmacist?

A That is possible, yes, sir.

Q That could be gleaned from this printout?

A I think only subject to, you know, a confirmation by either a file -- a review of the file documents or by investigation.

You may have situations wherein a particular pharmacy shows up repeatedly as filling certain types of prescriptions. I mean, there are a lot of things that can be gleaned from this, but they are -- what I am trying to say is that this information will ultimately have to be confirmed by an investigation.

Q With this information, the investigator is pointed to the areas of investigation, is that correct?

MR. LESCH: I did not hear that question, sir.

MR. FOGARTY: Would you read it back, please.

(Read question.)

MR. LESCH: I object to the question on the ground that it is leading.

A Yes, it does serve that purpose. We do make referrals to the Enforcement Unit for follow-up from this printout.

Q Who reviews this printout?

A I do, sir.

Q Anybody else?

A I review it and make assignments from it to the account clerk who I have trained to review the actual documents that verify the printout.

Q What do you mean by documents to verify --

A The prescription.

In other words, the prescriptions identified in the printout by batch number, and I had the actual prescription checked against the printout listing.

Q So that you and this clerk are the only ones who see this printout?

A It may also be seen by anybody else that I assign to do this particular operation. At this time, it's solely the account clerk or my principal clerk.

Q By this operation, you mean get the prescription itself?

A Right. View the prescription to verify the entry on the printout.

Q What do you do with that information when you get it?

A If it develops that it warrants what I consider investigative follow-up, a form memorandum is prepared identifying the patient and the pertinent data such as the practitioner BNDD number, the pharmacy BNDD

number, if it is involved, the name of the drug, and any other data that we may have obtained by internal checks such as the possibility it's a forged prescription, and refer that over to the Enforcement Unit for appropriate action on their part.

We also identify the practitioner and the pharmacy based on the BNDD number that appears on the printout and on the prescription document.

Q When you got a situation involving abuse of some sort or suggested abuse, could you get the information without this printout?

A Yes, sir.

Q How?

A By field investigation, that is, by going from pharmacy to pharmacy where you would get the data that relates to prescriptions that were filled by pharmacies, but you would not get any data from pharmacies in those situations where the doctor -- the practitioner directly dispensed medication to a patient.

Q If you were going as you say from pharmacy to pharmacy what in your experience would normally alert you to make such a canvass?

A The patient's name might be an indicator, a familiar alias that would be familiar to the

investigator, previously known.

Q How would the investigator --

A The -- pardon me.

Q Go ahead.

A The practitioner that was prescribing, that might be of interest.

The drug that was being prescribed.

There are many other factors, I mean, in the traditional method of going from pharmacy to pharmacy. Information from the pharmacies might be of some interest sometimes.

Q What would prompt you to go from pharmacy to pharmacy without the computer printout?

A Without the computer printout this would have been the traditional method of surveilling the prescription practices of the various practitioners, that would be to go to actual pharmacies that were filling the prescription and looking through them, and in that way trying to determine if there were any situations that might need correction of deficiency or investigative follow-up to determine -- particularly where a violation of the law might be suspected.

Q I believe you said there are 26 narcotic investigators in the State of New York.

A I believe about 24, sir.

Q Could 24 investigators cover every pharmacy in the State?

A Can they?

Yes, they can, but I think it would take -- take quite a long time. It might go into years.

Q How does this printout affect your operation?

A I believe that it offers a centralized opportunity to have all of this data compiled, processed and furnish an indication of where there would be situations that should be subjected to investigation.

Q What would be the value of this printout without the patient's name?

MR. LESCH: Are we still referring to Exhibit F?

MR. FOGARTY: Yes, we are.

A It would make it very difficult to utilize.

One of my original referrals was made from a printout during -- not furnishing the patient identity. I testified to this previously, where the investigator subsequently advised me that in that particular instance, the matter had already been investigated, and that it had been wasteful, in fact, duplicated, where I had not furnished the patient identity to the investigator.

Q Then the information contained in this printout without the patient name is of little value?

MR. JAFFE: Objection.

That was not his testimony.

MR. LESCH: I object to that, too.

MR. JAFFE: It is leading.

MR. LESCH: You are trying to lead the witness on one of the most important questions in the case. I would astounded if he were to say that incidentally.

A It's of lesser value.

Q Basically it gets you back to the old system, doesn't it?

MR. LESCH: I object to that questionon the same grounds.

A It makes it less useful.

Q That is the only printout that contains the name of the patient?

A We have a -- another printout that we are utilizing now that will contain -- does contain the patient identity and this is in those instances where the investigative unit, the Enforcement Unit requests a specific printout for a particular or specific subject which is under -- which may be under investigation.

For example, it may be for a specific physician, specific patient, specific pharmacy or specific drug. And we are furnishing in response to that type of request a printout which will give the complete prescription history of the doctor, patient, and/or pharmacy, or where a specific drug is selected a specific drug history.

Those all contain patient identities, the doctors by BNDD number, pharmacies by BND number, NDC number of drugs, and the other data which relates to the NDC number of the drug, the quantity, maximum daily dosage and dates.

Q But that is not a regular printout?

A No, sir, that is not a regular printout.

Q Has there been any implimentation of the sections of this statute referring to the length of time that this information will be kept?

A Yes, sir.

We have developed a manual of procedure for the purging of the -- actually the destruction of prescriptions that reach an age of approximately four years, 11 months, so that we comply with the new statutory requirement in that area that prescription records containing patient identities in essence be

destroyed within five years of the date of issue -- of the date that the department has received a record.

Q What has been done in that regard?

A We have established a policy and procedure with that, with the necessary records to reflect the destruction of the prescriptions. And that will be implemented, I believe it's May of 1978.

Q What will be done at that time?

A The prescriptions will be withdrawn from the vault and shredded in our security area under adequate supervision with an appropriate record of the destruction being made.

And this will be done on a monthly basis.

Q What kind of a record will be kept?

A It will be a log showing the date of destruction, the batch numbers, beginning and ending for that particular destruction, together with the calendar dates of the batches involved, the signature of the supervising prescription clerk and the principal clerk who will actually conduct the destruction by shredding with our own shredder within our security area.

Q This will relate to the prescriptions themselves?

A That is correct, sir.

Q From the log that you are preparing, will it be possible to determine, let's say, the identity of any patient whose prescriptions have been destroyed?

A No, sir.

Q Any doctor who wrote those prescriptions?

A No, sir.

Q The pharmacy that filled them?

A No, sir.

Q The doctor who dispensed them, if he's a dispensing physician?

A No, sir.

Q In other words, there will be no record?

A None.

Q This plan takes effect when?

A I believe it's May 1st of 1978.

Q Is this the plan to which you have reference?

A Yes, sir, it is.

Q When was that prepared?

A This was prepared during the month of November of 1974 by the Office of Management Analysis, after consultation with myself, the office of the counsel, Mr. Ambrose Donovan, and reviewed by Dr. Baker, the Associate Commissioner of Community Health Services, and I believe there was some consultation and review with the

Office of Management Analysis -- Office of Electronic Data Processing.

I think the date of inception will be March 1, 1978. I previously testified in error to it being May 1, 1978.

MR. FOGARTY: Mark this Defendant's Exhibit H.

(Document headed "Bureau of Controlled Substances Licensing, Triplicate Prescriptions Record Retention, Purging of Prescription Files," marked Defendant's Trial Exhibit H for identification as of this date.)

MR. FOGARTY: No further questions.

MR. LESCH: I object to Exhibit H on the same grounds that I have objected to the other exhibits of defendant, namely, that they are not included on the list of exhibits which was furnished to us by defendant's counsel and is annexed to the pretrial order.

Maybe we should take a recess at this time.

MR. FOGARTY: Fine. How long?

MR. LESCH: Ten minutes, five minutes.

MR. FOGARTY: All right.

(Short recess.)

(Whereupon, at 12:15 p.m., a luncheon recess was taken.)

oOo

AFTERNOON SESSION

1:50 p.m.

J O S E P H L. C A N N I Z Z A R O, resumed the stand and testified further as follows:

EXAMINATION BY MR. LESCH:

Q Mr. Cannizzaro, are you able to describe the manner in which the Bureau of Narcotic Control would follow-up an investigation with respect to a patient who is going to one or more practitioners in order to obtain an excess of the 30 day supply of the Schedule II controlled substance?

A No, I don't believe that I can describe their current procedural practice in that area.

Q So that you really don't know what the Bureau of Narcotic Control does with any information that you may give to the Bureau of Narcotic Control, is that correct?

A Substantially so.

You mean specifically with regard to any item that I would send over to them, refer for appropriate action for an investigator to follow, I would not know the specific mechanics of what they do in each specific individual situation.

Q You are not familiar with the investigative techniques that they are currently following in order to apprehend violators of Article 33, is that correct?

A I think my answer would have to be that I'm not familiar with what they actually do at this particular time, but I do not think that it would deviate much from prior practices as far as the follow-up of any prescriptions that might have been viewed within the files of pharmacies in the past. Or as occurs currently.

Q You recall, do you not, sir, that when I asked you this question at your deposition in this case on April 24th of this year, you responded that you did not know the method by which your reports are followed up, isn't that right?

A I did state that, yes, sir.

Q You said to me that if I wanted to know the way that the investigations were followed up, I should discuss that with Mr. Bellizzi.

A Yes, I think I described him as the best source of information in that area as relating to their current procedures.

Q You said that you really couldn't tell how they were going to follow it up, didn't you?

A Substantially, yes.

Q Yet, you are the person who decides what information is sent to the Bureau of Narcotic Control, isn't that right?

A From our triplicate prescriptions, yes, I am.

Q You also testified this morning that beginning in or about August of this year, you have established a printout which contains patient names, is that right, sir?

A I don't know whether I made a specific reference to the date.

Q What is your best recollection right now as to the date when a printout containing patient names was first established by you?

A My recollection is that it was prior to August of this year.

Q Was it in July?

A Very possible.

Q Is that your best recollection now, that it was in July that a printout --

A No, it's not my best recollection.

Q What is your best recollection?

A That it was sometime subsequent to April of this year.

Q Can you be more precise than that?

A Not without reference to my records.

Q Are those records here with you today?

A No, sir, they are not.

Q Exhibit F is a printout of patient names, is it not, sir?

A It incorporates patient names as one of the data items as identified in the computer.

Q Weren't you told that it was the policy of the Department of Health not to prepare printouts containing patient names?

A No, sir, I was not.

Q Are you familiar with the report that was prepared by Chester R. Hart, who was chairman of the Temporary State Commission of the State of New York to evaluate the drug laws?

A Which report is that, sir?

Q It is Exhibit 33 in this case.

Are you familiar with that?

A May I see it, please?

Q Yes.

A I'm not familiar with that.

Q Would it surprise you, sir, to learn that Assemblyman Hart at the time that Article 33 was presented to the Legislature stated that the proposed plan will not make use of massive printout of patient names?

A No, sir, that statement would not surprise me.

Q Would it surprise you to learn that Assemblyman Hart also said that the computer will not disclose identifying data about any patient unless based upon previous reports it is clear that such patient has been using stolen or forged prescriptions?

A No, I'm not surprised.

Q That does not surprise you?

A No, sir.

Q Isn't it a fact, sir, that Defendant's Exhibit F is a printout of the names of a large number of patients about whom there is no prior information or indication that those patients have been using stolen or forged prescriptions?

A There may or may not be prior information.

I can't tell just by looking at that particular printout, that one sheet that we have here.

Q But you testified this morning, Mr. Cannizzaro, that you made a decision to have a printout of patients with a total dose in excess of 30 days supply.

A That's correct, sir.

Q Isn't that right?

A That's correct.

Q You are not suggesting, are you, that every patient who received in excess of 30 days supply that you had a report about such a patient that he had been using a stolen or forged prescription, are you?

A No, sir, I'm not suggesting that.

Q So we have it then that Exhibit F is a printout that discloses identifying data about patient, isn't that right?

A That's correct, sir.

Q We also have it that the patients who are disclosed on Exhibit F are not patients about whom you have had any reports that they have used stolen or forged prescriptions, isn't that correct?

MR. FOGARTY: Objection.

A I've already answered that question previously. We may have some prior information. I don't

know.

Q I would like to know what the prior information is about any of the persons who are listed on Exhibit F that they used a stolen or forged prescription.

A I would have to check our files to see if we have any prior printout, for example, or a memorandum indicating that there was some material that would relate to that particular patient or identity on that prescription -- on that printout.

Q About how many persons are listed on the full printout of which Exhibit F is the first page?

A I don't know.

Q How many pages is the printout of which Exhibit F is the first page?

A I don't know that accurately, but I would estimate that it approximates 100 sheets.

Q Are you suggesting, Mr. Cannizzaro, that there is a report within the State Department of Health about every person listed on those 100 sheets that they have utilized a stolen or forged prescription?

A No, sir, I'm not suggesting that.

Q There are a number of persons who are listed on that printout about whom there is no report

that they used a stolen or forged prescription, isn't that right?

A That could be right. Could be.

Q Because the manner in which the printout of which Exhibit F is the first page is compiled is that the sole criteria that is given to the computer is whether or not they have received prescriptions in excess of a 30 day supply, correct?

A I believe that's part of it.

Q When you say that is part of it, what have I left out?

A That only -- those instances where the quantity exceeds a 30 day supply, but also those instances where there is a multiple source of the prescriptions. In other words, where the patient, in effect, is obtaining controlled substances from more than one physician which would be indicative of a patient shopping from one physician to another.

Q That is correct, but in instances of those patients, the total supply that the patient has obtained would have to be in excess of a 30 day supply, isn't that right?

A No, sir, that's not correct.

Q Will you explain to me why that isn't

correct? Because as I read it, the title of Exhibit F is "Patients With Prescription Total Dose in Excess of 30 Days Supply Processed in Month of August."

A Right, that is the title. But in modifying the format, we also built into it, without modifying the title of the printout, the situation that I described where a patient that is obtaining medication from more than one physician is also identified in this particular printout.

Q So there are patients on the printout who receive less than the 30 days supply, but receive the same drug from more than one physician, is that your testimony?

A Not necessarily the same drug, but it would be a Schedule II controlled substance.

Q Any Schedule II drug from more than one physician, whether or not it exceeds a 30 day supply?

A That is correct, sir.

Q Limiting ourselves for the moment to those patients who are shown on the printout of which Exhibit F is the first page to have received more than a 30 day supply in any month, is it not a fact, sir, that there is no information in the Department of Health that indicates that those patients had been using stolen or

forged prescriptions?

A There may be.

Q Would there be such information with respect to every such patient?

A In checking this particular printout, we have run into situations where a prescritpion listed on a printout is a lost, stolen or forged prescription.

Q I have no doubt about that, but my question to you is whether every person on that printout who is shown to have received more than a 30 day supply is also shown by comparison with another one of your printouts to have been using a stolen or forged prescription.

A Every patient?

I would say no.

Q Thank you. That is all I was trying to establish. To the extent that Assemblyman Hart said in Exhibit 33, "The computer will not disclose identifying data about any patient unless, based upon previous reports, it is clear that such patient has been using stolen or forged prescriptions," to the extent that he said that he was in error, was he not?

A I don't know, sir.

Q Does that statement seem to be correct to you after the testimony that you have just given?

A Well, I -- you know, I really don't know what his statement means.

Q You don't understand the statement?

A No, not completely.

Q What about the statement don't you understand?

A I don't know what -- just exactly what his statement means. If you want to read it again, I'll try to give you my reason for not being able to make this comparison that you wanted me to make.

Q Rather than my reading it again, why don't you read it to yourself. It appears at Page 4 of Exhibit 33. It is the last sentence on the page.

A I don't know actually what -- when he makes that statement or when he made that statement, if that's a complete statement.

Q I am not asking you whether it is a complete statement. I am asking you whether in light of the present practices of the Department that you have now testified to the statement which is shown as the last sentnece on Page 4 of Exhibit 33 is in error.

A I would not say that it's in error.

Q Didn't you just tell me that there are printouts such as Exhibit I which contain the names of

patients about whom the Department has no indication that they were using stolen or forged prescriptions?

A That's correct, sir. I can't tell until these things are checked.

Q Doesn't Assemblyman Hart --

MR. FOGARTY: Objection. He answered the question five different times and he said the same thing each time.

MR. LESCH: Are you directing the witness not to answer?

MR. FOGARTY: No. Do you have any objection to my making an objection?

MR. LESCH: You can make as many objections as you like.

MR. FOGARTY: Fine.

Q Doesn't Assemblyman Hart say to your understanding that printouts will not be made of patients unless the Department has an indication that they were using stolen or forged prescriptions?

A That's the statement that's in that letter. I don't know what his complete statement would be with regard to this whole area that we're discussing.

Q Why don't you assume with me for the moment that I am not trying to mislead you and that

BEST COPY AVAILABLE

this statement is correct, and if it turns out that there is something that is to be added, I am sure your counsel will add it on redirect.

Turning again to the last sentnece on Page 4 of Exhibit 33, is it or is it not in error in light of the present practices of the Department of Health?

A I would not characterize it as being in error. I still won't characterize it as being in error.

Q How would you characterize it? Would you characterize it as being correct?

A There is a difference. There is a difference, but I won't say that he was in error or is in error.

Q Would you say that it does not accurately set forth the policy of the Department of Health with respect to computer printouts?

A I think I described what we're doing and his statement in his letter speaks for himself.

And if you want to draw any difference, I think you can. I can see that there is difference, but if you are saying that he is in error, I don't believe that I can make that judgment just by looking at that statement.

Q Sir, in addition to Exhibit F, you testified

that there are additional printouts that are now being prepared by the State of New York with respect to patients, is that correct?

A Yes, sir.

Q Those additional printouts are printouts that contain data with respect to individual patient that have been requested by the Bureau of Narcotic Control, is that correct?

A That's correct, sir.

Q Such printouts include, for example, all Schedule II drugs that have been received by a particular patient, is that correct?

A That's correct, sir.

Q How many such printouts have been turned over by the Bureau of Controlled Substances Licensing and Evaluation to the Bureau of Narcotic Control?

A I would estimate at this point about five or six.

Q When were they turned over?

A I think beginning sometime in the latter part of September or early October.

Q Are you familiar with the pretrial order on consent that was entered into between the parties in this case?

A I have not read this, sir.

Q I direct your attention to Paragraph 13 which starts at Page 7 and begins, "As presently in effect, the following printouts are produced by the State system..." Then I direct your attention to the list of printouts that follows, and particularly F, which is Subparagraph (f) "Patients with prescription total in excess of a 30 day supply processed in month ..." and that is the printout which is now known in our case as Exhibit F, isn't that correct, sir?

A That's correct.

Q Then there are additional number of printouts listed, and then in Paragraph 15 it says:

"The only printout which contains patient names is that described in 13(f) above."

Do you see where it says that, Mr. Cannizzaro?

A Yes, I do.

Q Are you now saying that that statement was erroneous?

A No, sir, I'm not saying that.

Q Didn't you just tell me a moment ago that there is another printout that contains patient names?

A Yes, sir. But those are not regularly received. Those are only in response to a specific request.

Q You have never seen the pretrial order before today?

A No.

Q It has not been discussed with you by anyone?

A The contents of it may have been discussed with me. I'm not aware that it was specifically identified as the contents of that particular order or document that you have in front of you.

Q You mentioned a number of uses for Exhibit F on your direct examination. Do you remember that?

A Yes, sir.

Q Have there been any prosecutions whatsoever based on the information that has been contained on the printout entitled "Patients With Prescription Total Dose In Excess of 30 Day Supply Processed in Month of," since that printout was issued by the Bureau of Controlled Substances Licensing & Evaluation?

MR. FOGARTY: Objection.

A I don't know, sir.

Q So you don't know whether that Exhibit F has been of any use to the Department of Health whatsoever,

do you?

A Yes, I do know that there has been some use made of it because I use it myself to make extracts of data from this document and referred it over for investigative follow-up by the Bureau of Narcotic Enforcement.

Q But you don't know what the investigative follow-up has been, do you?

A Well, I don't know what the subsequent use -- the final results are or have been.

Q So as far as you know, there hasn't been any use whatever made --

A I just described the use that has been made by my Department as far as I know.

Q That is the full extent of your knowledge?

A That is correct.

Q You have no knowledge of any prosecution of individuals listed on any edition of Exhibit F, do you?

A Not at this point in time.

Q You have no knowledge of any arrests made of any individuals listed on the printout called "Patients With Total Dose In Excess of 30 Day Supply Processed In" a particular month, do you?

MR. FOGARTY: Objection.

A No, sir.

Q You have no knowledge of any case reports of violations of any patient listed on this printout, Exhibit F, do you?

MR. FOGARTY: Objection.

A No, sir.

Q Mr. Cannizzaro, I show you Exhibit C in this case. You saw that this morning, did you not, when it was shown to you by Mr. Fogarty?

A Yes, sir.

Q Do you recall that Mr. Fogarty asked you whether you were familiar with Exhibit C?

A He may have.

Q You don't recall that right now, is that right?

A I think I said he may have. I know I looked at it. I don't know if he specifically asked me that question as to whether I was familiar with it or not.

Q Do you recall when Mr. Fogarty showed you Exhibit C, you said you may have seen the document, but you are not familiar with it.

MR. FOGARTY: Objection.

That's not the question he answered that way. What I showed him was a different exhibit and I did not put it in evidence.

MR. LESCH: I think the record will speak for itself on this.

MR. FOGARTY: I hope it will.

Q Mr. Cannizzaro, will you answer the question, please?

A I would actually like to have read back to me that particular question that you are alluding to by Mr. Fogarty to me concerning this document.

MR. LESCH: We'll see if we can accommodate you.

(Record read.)

MR. LESCH: May we have the document that was referred to at that point?

MR. FOGARTY: For what purpose?

MR. LESCH: For my cross-examination of the witness.

MR. FOGARTY: There is no testimony as to it.

MR. LESCH: Let the record reflect that we have just gone back to the point in the testimony this morning that I was referring to and the question as read by Mr. Blitz refers to a document entitled "Administrative Policies, Procedures and

Forms, Office Practice" dated in March of 1973, and I am now asking Mr. Fogarty for that document with respect to which he asked Mr. Cannizzaro a question.

MR. FOGARTY: Which was never answered.

Now what do you want the document for?

MR. LESCH: The question was answered. Listen to the answer.

Mr. Blitz, would you read back the witness' answer?

(Record read.)

MR. LESCH: That is the document that I would like to have.

MR. FOGARTY: You have it.

MR. LESCH: Which document is it?

MR. FOGARTY: It's in the group I gave you this morning.

MR. LESCH: May we have this document marked as Plaintiffs' Exhibit 42 for identification.

(Document dated March 22, 1973 on the letterhead of The State Commissioner of Health, Albany, New York, marked Plaintiffs' Trial Exhibit 42 for identification as of this date.)

Q Mr. Cannizzaro, did you hear the question and answer that Mr. Blitz just read back with respect to what has just been marked Plaintiffs' Exhibit 42 for identification?

A No.

MR. LESCH: In that case, I would request that Mr. Blitz read it back again.

(Read question and answer.)

Q Is it correct then, sir, that you have seen Plaintiffs' Exhibit 42, but you are not familiar with it?

A That's correct, sir.

Q Is it also correct, sir, that Plaintiffs' Exhibit 42 was the document that set forth the policies of the Department of Health with respect to confidential information until it was superceded on February 27, 1974 by what is now Exhibit C in this case?

A I don't believe that this Exhibit C is a superceding document. This is an entirely different document.

Q Let me see if I can help you out.

I show you Exhibit A in this case, and I direct your attention to the first sentence of the second paragraph of Exhibit A which reads:

"Attached is a copy of G. A. Manual, Item 83 (updated 2/27/74)."

I ask you whether by looking at Exhibit A in this case you are now able to tell me whether Exhibit C did not supercede Plaintiffs' Exhibit 42.

A Plaintiffs' Exhibit C is Item 83 of the GA Manual, and it was an attachment to my memo of March 8, 1974.

This other document that you are referring to --

Q Referring to Plaintiffs' Exhibit 42.

A -- Plaintiffs' Exhibit 42 is Item 83.1 which is an entirely different document.

Q So that you are not at all familiar with Item 83.1, is that correct?

A I said I've seen it. I'm not completely familiar with it. It relates to electronic data processing and their confidentiality and security procedures.

Q You are not familiar with the --

A Not toally.

Q -- procedures for confidentiality of OEDP?

A I said not totally.

Q Don't you consider it part of your responsibility to make sure that the information that is

computerized is also kept confidential?

A I'm concerned, yes.

Q Don't you think that it would have been appropriate for you as the head of the Bureau of Controlled Substances Licensing & Evaluation to familiarize yourself with the confidentiality procedures of OEDP?

MR. FOGARTY: Objection.

A As I've indicated, I am in a general way conversant with their security procedures, but not specifically because it is a direct responsibility of the Director of the Office of Electronic Data Processing to provide for that type of security. I'm not familiar with their data processing system and the types of record formats and procedures and devices that they utilize.

Q Do you have any training in the area of maintaining the confidentiality of records, sir?

A I think about 27 years worth.

Q You consider all of your investigations as an investigator for the Bureau of Narcotic Control training in the area of maintaining confidentiality of records?

A Part of my activities were definitely related to maintaining confidentiality, because that

was a statutory requirement.

Q All you are saying is that you as an investigator had been told not to divulge any information that came into your possession by virtue of your office to unauthorized personnel, isn't that right?

A No, I also practice in addition to being told and being instructed, I also practice the maintenance of confidentiality, preservation of documentary and other types of evidence and material.

Q But you never drew up a set of guidelines for a large number of people to follow with respect to the maintaining of confidential information, did you?

A No, I did not do that.

Q You never consulted with anyone who was expert in that field in connection with assuring that a large number of persons did maintain the confidentiality of those records, did you?

A That's a hard question to answer.

Q Why don't you do your best.

A Pardon me. Yes, I'm going to try to do my best, Mr. Leech.

Over the years, I've had many instances where the preservation of evidence has been discussed, has been the subject material of courses which I have

taken, both given by the Civil Service Department and the -- at that time the Federal Bureau of Narcotics.

And in the course of many prosecutions and investigations in discussion with District Attorneys, for example, where we were always vitally concerned with the protection of any evidence material, including prescriptions --

Q Yes, but, Mr. Cannizzaro, my question to you was whether you ever consulted with any expert in the field of maintaining confidentiality with respect to drawing up a set of guidelines.

A Well, the difficulty is that many of those people, I'm sure, were experts, although they might not have been labeled as an expert in the field of maintaining -- developing guidelines for maintaining confidentiality.

Q Yes, and that is my question to you.

Did you discuss drawing up --

A I may have. My answer is that I may have.

Q Do you have any recollection of any individual with whom you discussed that?

A Specifically, no.

Q Are you responsible for the maintaining of the confidentiality of the printouts that come to

you from OEDP?

A Yes, sir, I am.

Q Is there a set of guidelines or procedures with respect to maintaining that confidentiality?

A Yes, sir.

Q Has that been marked for identification today?

A Yes, sir, I believe that's the document that's entitled "Security of Information From Unauthorized Disclosures."

Q Will you show me the exhibit to which you have reference?

A I believe that's Exhibit E.

Q Where in Exhibit E, Mr. Cannizzaro, is the regulation that describes the manner in which you are to maintain the confidentiality of the printouts that you receive from OEDP?

A They are not described specifically in this particular document.

Q Is there any document that has been marked for identification that does describe the regulations pursuant to which you are to maintain confidentiality of the printouts which you received from OEDP?

A The printouts that this relates to are the

printouts that I described earlier where a specific request is received from the Bureau of Narcotic Enforcement which would relate to a specific patient, practitioner, pharmacy or drug. That is the procedure and it's outlined in here indicating how it's to be processed by us, approved by the Associate Commissioner of Community Health Services, and then, in turn, delivered to the Bureau of -- the Office of Electronic Data Processing for preparation of the requested printout, and then, in turn, delivery to the requester.

Q So we have it then that there is no procedure that has been established pursuant to which Mr. Cannizzaro, namely yourself, maintains the confidentiality of printouts that are received from OEDP, is that correct?

A The procedure is also incorporated right here. I'm also one of the people subject to Section 33.71 of the Public Health Law.

I can't disclose any information contained on the prescriptions unless it's in the course of my official duties.

Q So that all of the rules and regulations which have been passed or have been promulgated by the Department of Health are simply Section 33.71, but there

have been no regulations which implement 33.71 with respect to you, Mr. Cannizzaro, maintaining confidentiality of printouts that you receive from OEDP?

A You mean specifically by name?

Q Yes, sir.

A I have never seen one to that effect.

Q How about specifically by office?

A I'm charged with the overall responsibility for the administration and supervision of that office by -- under the direct supervision of the Associate Commissioner of Community Health Services. I have not seen a specific document as you are indicating should be in existence.

A There is no document that describes the procedures that you are to follow when you receive printouts from OEDP, is that correct?

A There is as I have indicated in this security manual --

Q Exhibit E?

A Right.

Q Wherein Exhibit E is that set forth.

A With specific reference to the items that I just alluded to, that is, handling the specific requests from the Bureau of Narcotic Enforcement that would relate to patient identity.

Q Yes, but I am not talking about only those specific requests, Mr. Cannizzaro. I am talking about all of the printouts that you receive from OEDP.

I ask you again whether there is any written regulation that you are aware of which describes the procedures that you are supposed to follow with respect to maintaining the confidentiality of those printouts.

A Item 83 applies to me. Section 33.71 applies to me.

I am charged with the overall responsibility for operating that bureau and maintaining confidentiality.

Q Is there anything in Item 83 that says what you are supposed to do --

A Me specifically?

Q -- when you receive a printout -- you or anyone else who receives a printout from OEDP?

A No.

Q Is there anything in Item 83 or any other document that has been prepared by the Department of Health which says how many copies of a printout you may receive from OEDP?

A No.

Q Is there any regulation that has been promulgated which says when documents or printouts that have been received by you from OEDP are to be destroyed?

A Definitely in the situation of the specific request as outlined in this particular security manual, Exhibit E.

Q Mr. Cannizzaro, just so that we don't have to keep repeating ourselves here, I am not limiting my question to specific requests of the Bureau of Narcotic Control is making of you.

I am asking you with respect to all of the printouts that are received by you and anyone else in the Bureau of Controlled Substances Licensing & Evaluation, are there any procedures which set forth when those printouts are to be destroyed.

A Written procedures you are asking?

Q Yes, sir.

A No, sir. Not to my knowledge.

Q Are there any procedures which say whether or not you or anyone else who receives a printout from OEDP may take them off the premises of the Department of Health?

THE WITNESS: Let me have that question again, please.

MR. LESCH: Mr. Blitz.

(Read question.)

A The only specific ones again relate to the -- those selected request printouts.

Q So there is no procedure --

A No written procedure.

Q There is no written procedure, Mr. Cannizzaro, which describes when the printout that contains the list of all patients who have received in excess of a 30 day supply of Schedule II drugs may be taken from the premises of the Department of Health, is that correct?

A There is no written procedure.

Q Is there any written procedure as to whether anybody who receives such a printout from OEDP may make Xerox copies of it?

A There is no written procedure relating to that.

Q Is there any provision that you or anyone else who receives printouts such as Exhibit F from OEDP receive such prints that you have to sign a slip for them indicating that you have received the printouts?

A Did you except the items in Exhibit F?

Q I am referring to Exhibit F.

A Yes.

Q When you receive Exhibit F, do you have to sign anything indicating that you have received it?

A Which one is Exhibit F?

Q Here it is.

A This Exhibit F, this is the patients with Rx doses in excess of 30 day supply processed in the month of August. When this printout is ready or was ready Data Processing notifies my print clerk, it's delivered to her and she logs it in.

Q The clerk logs it in?

A That's right.

Q Then the clerk gives it to you?

A That's correct.

Q Where is the procedure, the written procedure pursuant to which the clerk logs it in?

A There is no written procedure.

Q Is there any procedure pursuant to which you have to sign a receipt that you have received Exhibit F?

A No, sir.

Q Mr. Cannizzaro, after you have received Exhibit F, you make a determination as to certain names on Exhibit F that are to be given to the Bureau of

Narcotic Controls for further investigation, is that right?

A I make a -- I scan it, and will make a determination as to which of the items should be ultimately referred over to the Bureau of Narcotic Enforcement.

Q Have you, in fact, referred various items on Exhibit F over to the Bureau of Narcotic Control?

A Yes, sir.

Q Do you receive a written receipt from the Bureau of Narcotic Control whenever you turn such items over to them?

A All I turn over to them is a memorandum identifying the particular, let's say, patient subject on that particular report and pertinent data which we will translate in some instances, for example, the BNDD numbers, will translate those into the actual practitioner identities and pharmacy identities and the NDC numbers, drug identities.

Q Do you receive a receipt when you turn over that type of memorandum to the Bureau of Narcotic Control?

A No, sir, I do not receive a receipt.

Q How does it get to the Bureau of Narcotic Control?

A It's -- those memos are delivered by my secretary or one of the clerks in my office in her absence directly to the Bureau of Narcotic Controls.

Q Is the Bureau of Narcotic Controls in the same building?

A The same building.

Q Are there any security guards in the building where your offices are?

A No, sir. Not to my knowledge.

Q Are you aware of any security precautions that are taken at night after you leave the premises?

A Yes, sir.

Q Are those precautions set forth in writing anywhere?

A Yes, sir.

Q Where are they set forth?

A I believe you may have them in here with regard to the closing and locking of our offices and the turning on of the central station alarm both for our security area and for the vault.

Q Will you show me by reference to defendant's exhibit in this case what you have reference to?

A I said they may be in here. I'm not sure

that they are.

I don't believe it's in here. I was looking at the access to vault security area memo of March 18, 1974. It's not included in there, but we have it documented.

Q Mr. Cannizzaro, are you bound by the strictures contained in Defendant's Exhibit B and D for identification?

A I don't understand your question as to whether I am bound by the strictures.

Q Are you also supposed to follow the instructions that are contained in Exhibits B and D?

A I run the Bureau. I see that those instructions are adhered to by my employees in the Bureau.

Q Are you also supposed to follow those instructions?

A Well, which ones do you have reference to? Let's be specific.

Q I am talking about all of the material in writing --

A I set those up.

Q I am asking you whether you follow them also.

A Where I am identified in here, I, of course,

adhere to those portions of it. Where it says the director does this, the director does that, he does that.

Q I don't see that the director is mentioned at any place in Exhibit B. Does that mean that you feel that you are entitled to disregard Exhibit B?

A Absolutely not.

Q That is what I am asking you.

You feel bound by Exhibit B, don't you?

A I have to adhere to Item 83 of the GA Manual. However, this memo is from me to all employees of the Bureau of Controlled Substances Licensing. They are complying with my memo that I prepared. I, of course, comply with Item 83 myself.

Q Your signature does not appear on the signature sheets that are attached to Exhibit B, is that correct?

A That's correct, sir.

Q Your signature does not appear on the attachment to Exhibit D either, is that correct?

A It doesn't appear on the attachments to either one of those, but as I explained to you that memo is from me. I've signed it, both of them. Those are my directives.

Q Similarly your signature does not appear

on Exhibit A, is that correct?

A It appears on Exhibit A as being from me to all non-bureau employees, Bureau of Controlled Substances. Again, that's my directive as far as the confidentiality of records.

Q What investigation is made of non-bureau employees of the Bureau of Controlled Substances Licensing before they are permitted access to the Schedule II information?

A You have reference now to this memorandum here and the people identified, non-bureau?

Q Yes, sir.

A Okay.

Now these --

MR. LESCH: Let the record reflect that Mr. Cannizzaro is referring to Exhibit A.

THE WITNESS: Exhibit A. And the people identified there are all State Health Department employees.

Dr. Baker who is the Associate Commissioner of Community Health Services.

Frank Conte who is no longer an employee of the State Health Department. So

he has been updated. On our new list, he is deleted.

Mrs. Cook, Office of Electronic Data Processing.

Mr. Ovedovitz, Mrs. Yemmo, Mr. Kevin Brennan, also from the Data Processing Office.

And Mr. William Aumic, the administrative assistant to Dr. Baker.

Those are subjected to the usual civil service type of clearance.

Q Is a drug check made by the civil service when it is checking potential employees of the Bureau of Narcotic Controls or the Bureau of Controlled Substances Licensing & Evaluation?

A As I testified earlier today, I'm not totally aware of the civil service investigative procedure. I do know that they have an investigative unit. I assume that drug utilization would probably be one of their items. Now I don't know.

Q Is it also correct that you don't know whether a check is made to determine whether any of the persons under your supervision have criminal records?

A All I know is that they are subjected to the usual civil service clearance procedures, whatever

those are. As I indicated to you, I'm not aware of what they are.

Q So is it also correct, Mr. Cannizzaro, that you do not know whether any of the employees under your supervision have criminal records?

MR. FOGARTY: Objection.

The question has been answered.

A I think I've answered that question.

MR. LESCH: Are you instructing the witness not to answer?

MR. FOGARTY: I merely stated an objection.

THE WITNESS: I think I've answered that question adequately, that --

MR. LESCH: With all respect, I don't think it is your decision to make whether the answer is adequate or not.

Q I would like to know whether you know whether any of the employees under your supervision have criminal records.

MR. FOGARTY: Objection.

A I would assume that they do not.

Q I am not asking you what you assume. I am asking you what you know.

MR. FOGARTY: Objection.

A I think I'm going to have to answer that in this manner:

I feel that the civil service procedure certainly relates to clearance for prior record of any type.

Q Do you know that for a fact or is that what you assume?

A I think that I would have to predicate that on my own personal experience because I've undergone civil service clearance.

As I recall, I've been fingerprinted. I filled out applications that related -- I think there were questions on there that related to medical history which if -- for example, if I answered incorrectly or falsely would be determined in the course of a Civil Service Department Investigation.

Q Now let me ask you my question and that is, Mr. Cannizzaro, whether you know whether any of the employees in the Bureau of Controlled Substances Licensing & Evaluation have criminal records.

MR. FOGARTY: Objection.

A I am going to say this. That I do not think they have it because of the fact that they go

through civil service screening. I've gone through it. And those are the areas that I was checked out. I was asked questions with regard to those areas.

Q Let me ask you again.

Do you know, Mr. Cannizzaro, whether or not any of the employees in the Bureau of Controlled Substances Licensing & Evaluation have criminal records?

MR. FOGARTY: Objection.

Q Can you tell me that none of them have criminal records, Mr. Cannizzaro?

MR. FOGARTY: Objection.

Q If so, please say so.

MR. FOGARTY: Same question.

MR. JAFFE: The question can be answered yes or no, though.

MR. FOGARTY: I didn't ask you for anything. I am making an objection on the record.

MR. JAFFE: I am responding to your objection. The question can be answered yes or no.

MR. FOGARTY: You are not to respond to my objection. You are not the judge.

MR. JAFFE: I understand that.

But I can respond. I am counsel.

MR. LESCH: Would you like the question read back, Mr. Cannizzaro?

THE WITNESS: I think I understand it, Mr. Lesch.

MR. LESCH: May I have an answer to it then?

A Yes, my answer is going to be that I don't believe that any of them have any criminal record because of the fact that they've undergone the same civil service security screening that I have.

MR. LESCH: Off the record.

(Discussion off the record.)

BY MR. LESCH:

Q Do you know, Mr. Cannizzaro, whether any of the employees of the Bureau of Controlled Substances Licensing & Evaluation have criminal records?

We've been sitting here and waiting for an answer now for about three minutes. Are you thinking about the question or are you just refusing to answer?

A I'm thinking about it, Mr. Lesch.

MR. FOGARTY: Let us have a five minute recess.

(Short recess.)

MR. LESCH: Will you read the question.

(Read question.)

A No, I don't definitely know that.

Q Mr. Cannizzaro, isn't it a fact that most of the employees that are listed on Exhibits A, B and D have started to work for the bureau which you supervise within the year preceding March, 1974?

A I think that statement is substantially true

Q Has there been a further turnover since March, 1974?

A Yes, sir.

Q So that many of the persons who are listed on Exhibits A, B and D are no longer employed by the Bureau of Controlled Substances Licensing & Evaluation, is that correct?

A Some of those are no longer employed by our bureau.

Q Have you obtained similar signed statements from the persons who have taken the place of the persons who are listed in the attachments to Exhibits A, B and D?

A Yes, sir, I have.

Q Mr. Cannizzaro, what is the turnover in your bureau every year?

A I haven't kept any records on the rate of turnover, but we've had some people leave and some other people take their place.

Q How many employees are there under your supervision?

A A total of 17.

Q Within the past year, how many of those 17 have been hired approximately?

A We may have five or six, possibly seven new ones.

Q What procedures do you follow to review the various security procedures with new employees?

A The -- we have a period -- an indoctrination procedure that is conducted by my principal clerk. And this matter of confidentiality is discussed even before the indoctrination when the people are first interviewed for positions.

But at the time that they definitely are coming with our bureau, then she will proceed to review the confidentiality memorandum with that individual and have them sign the sheet indicating that they have read it, are familiar with it, and are to abide by it.

And then she will then familiarize them with the layout of our area and the security procedures

that we have in existence, particularly with regard to the security area and the security vault.

Q Is there a test given to these employees to see whether they really understood what the confidential provisions are?

A We do not give any tests.

Q Is there any way then that you can determine that they've done any more than sign the memorandum?

A Just by observing them during the course of their daily activities.

Q Are the procedures in writing pursuant to which confidential provisions are reviewed with employees of your bureau?

A They read the confidential statement, and the memos that go with it, and they will also be reviewing the various logs that are kept and this new security of information from unauthorized disclosure. That will be circulated throughout our office for all of the staff to review and to sign a statement indicating that they have reviewed it, are familiar with it, and will abide by it.

Q Some of the employees who sign the attachment to Exhibit B are still in the employ of the Bureau of Controlled Substances Licensing & Evaluation, are they

not?

A Yes, sir.

Q Have they ever been requested to reread Exhibit B?

A Yes, I think there is an update on Item 83, and we recirculated a new memo with the new Item 83 attached, and they again signed the sheet to indicate that they had read it, are familiar with it, and would comply with it.

I think there were some minor revisions. I'm not totally aware of it right now.

Q Do you know that they actually read it?

A Do I personally know this?

Q Yes, sir..

A No. This procedure is conducted by -- under the supervision of my principal clerk.

Q You mentioned that in the coding area there are two temporary clerks in addition to seven civil service clerks, do you remember that?

A That's right, sir.

Q What check is made of the temporary clerks?

A I do not know. They are furnished to us through the personnel office of our department.

Q Is any credit check made of any of the

employees in your bureau?

A I do not know.

Q Is there any yearly routine for subsequent checks after the clerks are initially employed?

A No, there is no such routine.

Q What check is made of the key punch operators?

A That I don't know.

Q Are the temporary clerks civil service employees?

A The temporary clerks -- no, they are not civil service employees.

Q What is the volume of prescriptions processed per month?

A Approximately 125,000.

Q Do you know what the cost to the Department of Health is of the personnel that process the triplicate prescriptions both under your supervision and under the supervision of OEDP?

A There are some figures on that, but I don't -- I don't have those.

Q Would it be in excess of $1 million per year?

A Definitely not.

Q You are including in that answer the

computer time?

A Yes, yes.

I'm trying to recall. There are some figures being developed -- being developed by Dr. Baker. I don't think I have them as yet, final figures. But there is -- I think all the factors that are involved in the handling of the prescriptions are being taken into consideration to arrive at a total cost figure.

Q Approximately how many prescription blanks are there now in your posession? I am talking about filled prescription blanks that have been sent in by doctors or pharmacies under Article 33.

A Our rate of receipt is approximately 125,000 a month.

I cannot give you a good solid estimate for the simple reason that there is a period of time from April 1st through September of 1973 when prescriptions were being received and because of the -- of a court injunction they were not processed. So we don't have -- and we've not done anything with those prescriptions and we don't know what the actual volume count of those would be.

So I really couldn't give you a firm estimate other than to indicate to you that we are now

on a monthly basis processing, receiving and processing about 125,000 prescriptions a month.

Q Is it your intention to store all of those prescription blanks in the same vault that is currently being used to hold them?

A The prescription blanks?

Q The filled prescription blanks.

A The filled prescriptions, the cashed prescriptions?

Q Yes.

A We will store them in the present storage facility until such time as we move to our South Mall location, the Empire State Plaza, which is currently projected for March of 1975, and is dependent upon the construction of an adequate vault in the platform area of that building.

Q About how full is your vault now of these prescription blanks, can you tell me? Is it a fifth full, half full or is it almost all full of filled prescriptions?

MR. FOGARTY: Objection. That's irrelevant. There is a statutory obligation to store them.

MR. LESCH: You may answer,

Mr. Cannizzaro.

A In our present vault, I think probably maybe one-eighth the area is occupied by the cashed prescriptions and that's a real rough estimate.

Q How is access to the building controlled during normal working hours?

A That is public access.

Q Anyone can walk in?

A Into the building certainly.

Q How is access controlled during non-normal working hours? By that I mean after five or before nine in the morning.

A I think the doors to the building are locked somewhere between 4:45 and 5:00 p.m. each night.

Q Who has keys to the building?

A I don't know who has keys to the building. I know I do. I think Dr. Baker has a key. I don't know who else has a key to the building.

Q What is the method for controlling the number of keys to the building that are issued?

A I do not know that.

Q What happens when a key is lost?

A I don't know.

Q Mr. Cannizzaro, do you recognize that

there is a greater danger of unauthorized disclosure because the information on the triplicate prescriptions has been computerized?

MR. FOGARTY: Objection.

A No, I don't recognize that.

Q In your view then there is no greater danger now of unauthorized disclosure now that the state has it than it was before when the triplicate prescriptions were maintained in the pharmacy?

A No, I don't see any greater opportunity for disclosure under the present system.

Q As far as you are concerned, these provisions to maintain confidentiality are all unnecessary, is that right?

A I think they are definitely necessary.

Q Why are they necessary?

A To preserve the confidentiality of the document that's received by us centrally.

Q If there is no danger that the confidentiality is going to be violated, why is it necessary to take precautions to maintain the confidentiality?

MR. FOGARTY: Objection.

A Section 33.71 of Public Health Law requires us to maintain confidentiality with respect to any data

on these documents. So we follow the mandate of the statute.

Q But you don't recognize that aside from the mandate of the statute this information is of a confidential nature?

A I don't really understand your question.

Q Suppose there were no statute which required you to maintain the confidentiality, would you believe it incumbent upon you to see to it that there were confidentiality maintained for these documents?

MR. FOGARTY: Objection.

The question assumes a set of facts not in evidence, having nothing to do with the case.

MR. LESCH: You may answer.

A Well, I'm having difficulty comprehending your question. Just what is it that you do want to know?

Q You don't understand my question?

A No, I don't, frankly.

MR. FOGARTY: He is asking you if apples were oranges would you like them.

Q What I am asking you, Mr. Cannizzaro -- I think it is a revealing fact that you don't understand the question -- but what I am trying to get you to understand or get your answer to is do you recognize that

information on a prescription blank that sets forth the particular type of drug that a patient is receiving from his doctor is information which should be maintained confidentially regardless of whether there were a statute?

A This confidentiality requirement has existed before the triplicate prescription law. That -- I mean is that what you are saying? That was in existence prior to the current Article 33 which went into effect April 1, 1973.

This has always been true, maintenance of confidentiality.

Q Do you understand the reason for the statute?

A I probably don't understand all of the reasons for the statute.

Q Do you understand any reason why the statute should have been passed which required that these records be maintained as confidential?

A I'm saying to you that this confidentiality requirement existed prior to this current statute.

Q Regardless of when it was enacted --

A That's what I am trying to tell you. Maintenance of confidentiality on these prescriptions, not only the triplicate prescriptions, but prescriptions for other than Schedule II substances exists now and

existed prior to the current law for prescriptions that -- Schedule II substances that now require the triplicate prescription. This has always been the fact.

Q Let me try it once more.

Do you understand why these statutes have been passed, what the reason is why a legislature has passed a statute requiring that triplicate prescriptions or prescriptions containing information about the drugs that patients use should be maintained as confidential information?

MR. FOGARTY: Objection.

A Confidentiality was required prior to the triplicate prescription law and is still required is what I'm saying.

Q Mr. Cannizzaro, how many names from the printout of which Exhibit I is an example have you forwarded to the Bureau of Narcotic Controls since that printout was first issued in April, 1974?

MR. FOGARTY: Objection.

The question has been asked and answered before.

A I think we furnished you with copies of my quad weekly reports, and that type of information is included in there. I made numerous referrals, but I can't give you the -- a solid figure because I make

other types of referrals over to that do not necessarily relate to this particular printout. For example, forged prescriptions that may not be on that particular printout, excess purchase of prescriptions, and a few other items that are referred over for investigative follow-up, not necessarily from that one printout.

MR. LESCH: I have no further questions.

MR. JAFFE: I just have one or two here.

EXAMINATION BY MR. JAFFE:

Q Referring you to Defendant's Exhibit B, you stated under cross that you had 17 employees working for you, is that right?

A That's correct, sir.

Q And that does not include key punch operators, is that correct? They are not part of this group?

A They don't belong to the Bureau of Controlled Substance Licensing. That's an entirely --

Q Separate.

A -- separate unit.

MR. LESCH: May I ask one question just to clarify something?

BY MR. LESCH:

Q Dr. Baker called your unit Bureau of Controlled Substances Licensing & Evaluation.

A That's perfectly all right.

Q Is that the correct title or is it Bureau of Controlled Substances Licensing?

A Licensing & Evaluation would be adequate, but we -- a working title is Bureau of Controlled Substances Licensing.

MR. DONOVAN: Do you have people who have gradually dropped that word "evaluation"?

THE WITNESS: Right.

MR. DONOVAN: I think they created the word "evaluation" --

MR. GREENWALD: Is this off the record?

MR. LESCH: Let it be on the record.

MR. DONOVAN: I think it was created initially as we cleared up at the pretrial that the correct name was Bureau of Controlled Substances Licensing & Evaluation, but whether it was done officially or un-

BEST COPY AVAILABLE

officially, it has gradually evolved to this Bureau of Controlled Substances Licensing.

BY MR. JAFFE:

Q In this connection, I call your attention to B, and in B you will see that there is a list of at minimum 24 employees, some permanent, other temporary.

A I think you'd have to delete those people that have been lined out. In other words, this was a continuing document showing additions and deletions of personnel.

Q So these were not all signed in March of 1974? There are several that are indicated that are not, but most are indicated were signed in March?

A We would ultimately have at any given time 17 people unless -- or less -- 17 or less, but not more.

Q How many of those would normally be temporary employees?

A Right now the normal is two.

Q It is indicated from the third page of that exhibit, for example, that there were six temporary employees on March 20, 1974. Is that correct?

A That would have been true on March 20, 1974, but today there are only two.

Q In March, 1974, who were these temporary

employees, that is to say, what was their background?

A I don't know that.

Q In what sense were they temporary?

A They were temporary service employees hired for our bureau through the personnel office of the Health Department.

Q Intended to work for a short period of time?

A There was no definite tenure indicated.

Q Do you know if the personnel office gave these temporary employees any background check whatsoever?

A No, I don't know.

Q And you don't know whether, for example, any of these people were checked for prior drug or criminal involvement?

A No, I don't know.

Q I take it these people left after a short tenure in your office?

A The tenure was a variable item. Some would be short and some would be long, some would be in-between.

Q Of the approximately 11 listed there, only two remain and it has been less than a year, is that correct? Referring to Page 3 of Item B.

A Right, two remain.

Q Are two of the names of the temporary employees still employees in your office?

A There may be possibly one of those still with us. We have an updated list.

Q But it's fair to say you know nothing about the background of these people?

A I have made no personal check. These people as I indicated to you were hired through our Personnel Department.

Q But it is perfectly possible that one of these people or more could have been employed on request of any politician, for example?

MR. FOGARTY: Objection.

Q As far as you know?

A I know nothing of the kind.

Q But you do not know that not to be true?

MR. FOGARTY: Objection.

A I don't know anything in that area. These people were hired through our Personnel Office. I make no personnel security checks myself.

Q And you know of none on these people?

A I know -- they are hired through the Personnel Department.

Q You have ability under the system to

monitor doctor use of Schedule II drugs, is that correct?

A Y , sir.

Q Do you do any evaluation of doctor use from the sheets you printout?

A We do some from the printouts, from some of the printouts.

Q Do you, for example, know what percentage of doctors with BNDD numbers prescribe Schedule II drugs?

A We could give you a figure on that. We'd have to calculate to determine that.

We could do that. We will ultimately.

Q But you have not done that to date?

A No, I haven't developed a definite figure. It wouldn't be too difficult.

Q You have no way of estimating that at this point?

A Oh, I can give you a rough estimate of approximately -- oh, let me see -- 70,000 -- 65, 70,000 practitioners -- and these are the various practitioners in the State of New York that hold a BNDD number with the Drug Enforcement Administration, and of those I'd say approximately 35,000 in any given month are using triplicate prescription forms.

That will vary from month to month.

Q If one looked at a period of a year, would there be a significant increase? Would there be any different number than one would get just looking at the month?

A I haven't done that, but I assume that with this first year's experience there would be a variation. In later years, it may stabilize.

Q You are also in a position to evaluate what percentage of those doctors, for example, would use 80 percent of Schedule II drugs used in the State?

A We will have the capability of doing that. We have it now.

We are making a study right now that relates to dispensing practitioners. We're evaluating those, and we will get data from the computer that will indicate to us who the primary dispensers are and the volumes that are represented by their activities.

In other words, number of prescriptions and number of patients.

Q And you will be able to pick out doctors who prescribe greatly in excess of what other doctors prescribe, is that correct?

A We'll get a spectrum. We'll setup a scale and they'll fall in the various gradations that are

determined.

Q For this it's true you do not need patient names, is that correct?

A We will definitely need patient names in the computers to give us that type of information because we're going to be determining, for example, how many different patients a doctor has. And the only way that that can be extracted is if the patient identity is in the computer so that it can make that determination.

Otherwise, without that information in the computer, it would not be able to differentiate one patient from another.

Q Isn't it a fact that without the patient's name you could pick out the amount each doctor is prescribing and the number of prescriptions that each doctor was given out?

A Numbers, yes, we can pick out numbers.

Q Isn't it true that if one doctor, for example, or many doctors were giving out much more than the other doctors, that you could most easily go to those doctors and find out from them the number of patients that each had?

A Well, you could do that, but we have the capability of differentiating, for example, between a

doctor that prescribes 100 -- utilizes 100 prescriptions and another one that also utilizes 100 prescriptions and the printout will readily tell us that the first doctor utilizes 100 prescriptions each for a different patient whereas the second patient who utilized 100 prescriptions it was all for the same patient.

Q That's readily available also by asking the doctor, isn't that correct?

A What basis would I have for asking the doctor? What am I going to ask him?

Q If you saw a doctor was using a great number of Schedule II drugs, you could ask that doctor how many patients he was prescribing for, could you not?

A Yes, we could ask that question.

Q But is it fair to say at the present time that you have no idea what percentage of doctors are prescribing what percentage of drugs, other than 100 percent of doctors prescribing 100 percent of drugs?

Let me put it differently.

You don't know if 20 percent of the doctors are prescribing it on percent of the drugs or if it is more evenly distributed than that, do you?

A We have a printout that's in evidence here that gives a breakdown of the total prescription

history that's processed in a given month that indicates that type of breakdown.

Q I understand that. My question --

A What you are asking about, in other words, the total number of prescriptions that had been processed and the total number of practitioners in a given -- in each of the given categories that has issued those prescriptions and the average number of prescriptions per practitioner type in that group, and I further indicated to you that we are going after data from that segment of the printout that relates to those practitioners that we've identified as dispensing practitioners to further refine that down to identify those that are the high volume dispensers for a low volume of patients.

Q My question was you have not done that evaluation at this point.

A We are doing it now. We are doing other evaluations, too.

Q So you could not tell us at this point where, if there are any, the major abuses are found in the prescribing of dangerous drugs or -- excuse me -- Schedule II drugs?

A I don't know whether these are going to be abuses. It will show major utilization. I think

before you can come to the conclusion that it is an abuse, I think the data has to be analyzed and then investigated.

Q My point is that at this point you have not done that and you don't know the answer to the question of where abuses may lie in the system?

A I don't have any definite answers to give to that question, other than to indicate to you that we are making studies of the -- at this time of the high volume dispensing practitioners.

Q You testified both on direct and on cross to two major changes in the printout system taking place since April of 1974, is that correct?

MR. FOGARTY: Objection to the use of the term "major".

A I think you better be more specific than that. Which changes are you referring to?

Q You testified that you now are printing out Exhibit F which may include as many as 100 sheets a month on which the names of patients appear, is that correct?

A I described the change in the format of that printout.

Q That is a change since April --

A Indicating that the substantive change was

the inclusion of the patient identity as it appears in the computer, together with a spatial separation between the various patients and a reorganization of the headings to provide a more utilizable format.

Q Is it fair to say that prior to the creation of Exhibit F there was no general printout of patient names, isn't that correct?

A I think I've indicated -- this was dated August. And I think in the questioning by Mr. Losch I was asked as to when this was started and my response was that it was probably sometime after April of 1974.

So that there would have been a printout prior to August, I'm certain, of 1974.

Q Since April then upon the date of which Exhibit F was created, this was the first time that patient names were printed out generally?

A I would say that that's true to the best of my knowledge.

MR. FOGARTY: Let the record indicate that Exhibit F has to do with August, not April. It's merely an update of Plaintiffs' Exhibit 18, I believe. The printout has been in existence from the beginning.

Q Did the printout which Mr. Fogarty has

referred to, Plaintiffs' Exhibit 18, include the names of patients on it?

A Can I see 18? I think I better make sure.

MR. FOGARTY: I think it is Exhibit 18.

THE WITNESS: Exhibit 18, this is one of the prototype printouts.

Q Did it have the patient names on it?

A No, it did not.

Q So the inclusion of patient names on that were the first time the patient names were printed out on the computerized printouts?

A Pardon me?

Q The inclusions of names on F was the first time going back to perhaps April that patients were printed out?

A Whenever this format was evolved -- and I think that was sometime subsequent to April -- I may be wrong on that -- just judging by my recollection -- that would be the first time that this printout indicated patient names.

Q Or that any printout indicated patient names?

A To my knowledge, this is the only one.

Q Isn't it also true that you now have a new

capability, that of requesting the computer to give back the name of a particular patient and that prior to April of this year that capability did not exist?

A Yes, I've testified to that.

Q Who made these determinations to change the accessibility of names and the printing out of names?

A Which changes are you talking about now? These were separate items. You are talking about two different printouts, types of printouts.

Q Start with the printing out of names and go onto the accessibility of names.

A Are you talking about Exhibit F?

Q Exhibit F.

A That determination was made sometime -- I am going to guess again -- sometime after February of this year.

Q By whom?

A 1974.

My instructions on it came from my boss, the Associate Commissioner of Community Health Services, Dr. Arthur Baker.

Q What about the decision to have the names on the computer accessible upon request? Who made the decision to program the computer in that way?

A Approval -- approval for me to do that came from Dr. Baker.

Q But you requested it?

A This thing was under review. I didn't have to make a request.

Q Do you know of any regulation which restricts you or your department from printing out the name of every patient on every prescription that comes into your office?

A I think that particular item would be covered under our security information from unauthorized disclosure, plus the -- plus Item 83 of the manual, general administrative manual, plus Section 33.71 of the Public Health Law.

Q You are referring at first to Exhibit E, is that correct?

A If you will show me Exhibit E.

Q Here is E. I show you Exhibit E. That is the unauthorized disclosure, is that correct?

A Yes.

Q Unauthorized disclosure memorandum to which you referred?

A Right.

Q Is there anything in that memorandum which

indicates that you could not printout the name of every patient on every prescription that comes into your department?

A We have the capability of printing out every name.

Q Is there any --

A Getting a printout from the computer?

We could ask the computer to do that.

Q And there is no regulation which prevents you from doing that, to your knowledge?

A I don't believe that -- let me put it to you this way:

That would not be generated without authorization from Dr. Baker.

Q But there is nothing which restricts Dr. Baker from doing that, to your knowledge?

A I don't know.

Q In other words, if you feel it's useful that every single name of every single patient be printed out, you would not know of any regulation which would prevent you from asking Dr. Baker to authorize such a printout?

A I could ask.

Q But at this point you know of no such

regulation?

A That would prevent me from asking him?

I could ask any day. I doubt that I'd ever get approval.

MR. JAFFE: That is all.

BY MR. FOGARTY:

Q Mr. Cannizzaro, does your department operate on a budget?

A Yes, sir, it does.

Q What would it cost, a rough estimate, to printout every name on every prescription?

A I think if we ever tried that I think they'd probably close us up.

To put it another way. It's not practical, it's not feasible. It's not reasonable.

Q Let's assume, Mr. Cannizzaro, that you got the printout with every name on every prescription. What would you do with it?

A First I'd have a problem finding storage space with it, and I don't see how it would be practical to make any utilization of it. It's too voluminous. It would be too voluminous.

Q What would you have to do in order to get pertinent information out of such a printout?

A Actually it would have to go back into the computer, I mean, to get data out of it.

Q Let's assume that you have gotten out of the computer what was just suggested, a complete printout of every name on every prescription. In order to make any effective use of that, what would you have to do?

A It would be just as impossible as the investigators going from pharmacy to pharmacy to scan prescriptions because you'd have to have a battery of personnel just to review the listings of the patients on the printout.

Q In other words, it would have to be scanned item by item?

A Item by item manually.

Q Then somebody else would have to be collating the information?

A It would be an impossible task.

Q When this printout with the names comes out of the computer, and it is delivered to you, where does it go.

A It comes immediately to me from my principal clerk after it's logged in, and I lock it in my special computer cabinet, computer printout cabinet.

I put all of the monthly printouts in there.

Q Does anybody else get a copy of it?

A No, sir.

Q Do you send it to anyone?

A No, sir.

The -- let me correct that.

The only copies that are made are those that are statistical in nature and I furnish that copy to Dr. Baker as the prescriptions --

Q But those don't contain patient names?

A No, there is no patient identity.

Q In other words, the patient identity printout comes to you and it stops at you?

A Right. And it's not utilized unless I authorize it's utilization.

Q Mr. Cannizzaro, the only printout containing patient names on a regular basis is Defendant's Exhibit F, is that correct?

A That's correct, sir.

Q Any other printout with a name, a patient name, would be made as a result of a request?

A That is correct, sir, a specific request.

Q That specific request, what would have to happen to it before it got to the OEDP?

A It would initially have to be submitted

to our office from the Bureau of Narcotic Enforcement, where it would be checked to see that it was properly executed.

After initialing by my principal clerk and then myself, it would then be sent along with a data form that we send to Data Processing, both of them in triplicate to Dr. Baker for his review and approval on both forms.

It would then come back to us, assuming that it is approved -- let us stick with that -- and at that point -- and he would retain a copy of each form for his records.

The Data Processing form would not have any identity on it other than, for example, a BNDD number. There would be no other identity on it.

After he has approved it, we would then generate -- complete the Data Processing request form and forward that containing Dr. Baker's approval and my approval to the director of the Office of Electronic Data Processing for generation of the requested printout.

And then when the printout was ready, when we were notified, then it would be picked up, at which time a countersignature would be executed on the form, indicating the number of copies that were requested

and received, and then upon receipt in our office it would be logged in. There is a special data request number file setup for each request.

And after we had received -- when we have received the requested printout, we would then notify the Bureau of Narcotic Enforcement that that printout, requested printout was ready. They would come down, complete the execution of the receipt, double signature forms, and depart with their copies in a sealed envelope together with a copy of the initial request, which would be keyed to the identifying number of the printout on the envelope.

And that's it in substance. It's more fully described, more completely described from our security information from unauthorized disclosure procedure. It's quite complex.

Q In describing the procedure, you also mentioned it comes down. Why did you use that expression?

A I think that was in reference to the initial request from the Bureau of Narcotic Enforcement. I said down because they are located on the first floor which is ground level at the front and we're located on the second floor of the same building, which is ground level in the area that we're located.

Q Are you actually on the second floor or are you in the basement?

A It's in the basement, but we refer to it as the ground floor.

Q In other words, in order to reach the area where you are located, someone has to come in the front door and go downstairs?

A Right. You come in the front door and go to the end of the front corridor, take the stairway down and then you come into our area, walk down that corridor. On the left will be the administrative area where I'm located, and on the right in a separate and entirely separate area will be the security area that is -- which contains within it the prescription processing area. To get into the security area, you have to go through a locked gate which has to be unlatched and which is controlled by the supervising prescription clerk.

And then beyond that, we have the separate area that is separated by the heavy gauge screened fencing from floor to ceiling.

And then alongside that, across the corridor is located our security vault, which is entirely separate. And in order to gain access to the vault, you must have clearance from me. And to get into my office,

you must go through a locked gate, which is controlled by my secretary.

Q Mr. Cannizzaro, referring to Defendant's Exhibits A, B and D, after your name, Mr. Cannizzaro, Joseph L. Cannizzaro, Director, what does the exhibit contain?

A My initials.

Q In other words, you signed it, right?

A That's correct, sir.

Q What are the first three words of each memo? We will start with A and D.

A A and B is directed --

Q What are the first three words? That's all I ask.

A I'm trying to get them together. "We should all," contents of the memo.

Q Are you part of we?

A Yes, I am.

MR. FOGARTY: That's all.

MR. LESCH: I have a few more questions.

BY MR. LESCH:

Q Mr. Cannizzaro, do you have a copy of Plaintiffs' Exhibit 14 before you?

A Yes, sir.

This is the one you have just given me?

Q Yes. That printout contains a summary of all prescriptions processed in the month of -- dispensed and processed in the month of February, 1974.

A That's the top sheet, I think, of that printout.

Q This shows you an average quantity of Schedule II substances dispensed for each doctor in the State of New York, does it not?

A These are broken down by practitioner groups. First we're given total, and then this would be -- where it says MD, that would be physicians, DO, would be osteopaths, DDS, would be dentists, DPM's, would be veterinarians, and Dr. POD, would be podiatrist.

Q So that by reference to Exhibit 14, you are able to determine the average quantity of a particular Schedule II substance that is dispensed by all the doctors in the State of New York, is that correct?

A Primarily processed during that particular month.

Q During a particular month?

A Right, processed, prescription processed.

Q For example, for a drug which bears the

NDC number 318, you can ascertain the average quantity of that drug that is prescribed in that month by all doctors, is that right?

A Right, there would be a breakdown for total practitioners and then by individual practitioner groups.

Q So you could not only tell the average prescribed by every practitioner, but you could ascertain the average prescribed by every MD, every doctor of osteopathy, every dentist, every doctor of veterinarian medicine and every -- what is Dr. POD stand for?

A Podiatrist.

Q Podiatrist?

A This again is by practitioner groups.

Q By practitioner groups?

A By practitioner groups not by individual practitioner.

Q So that if you have a doctor whom you suspect is dispensing or prescribing too many drugs of any particular type, you could compare the total amount that that doctor prescribes with the average for the practitioner group to which he belongs, is that right?

A That can be done.

Q Then after you have done that, investiga-

tion could be made to determine whether there is a good reason for that doctor to prescribe an amount exceeding the average, is that correct?

A That can be done, certainly.

Q Is there a printout which shows the numbers of the prescription blanks that have been mailed to all doctors in the State of New York?

A We have a printout that is furnished to us or has been furnished to us wherein we keep track of our prescription supplies showing the various serial numbers and to whom they have been sold. That would be in numerical sequence as the prescriptions are sold.

Q How by reference to these printouts do you ascertain whether a stolen blank has been cashed?

A That's done in this fashion.

We have setup in the computer a listing of all reports of lost, stolen, etc., prescriptions which we constantly maintain.

When a prescription is processed and placed in the computer, it is automatically run against that listing in the computer.

If it appears that that particular serial number on that prescription has -- is on the lost-stolen list, we will get that particular printout that indicates

that a lost-stolen prescription has been previously reported lost or stolen has been cashed, and gives us the identifying data.

Q So that the number on the prescription that is received by your bureau is run against the number that is already contained on the list within the computer as a lost or stolen prescription and if it is the same number, you will know that one may be a lost or stolen prescription, is that right?

A The computer definitely says that that is on the list that has been reported lost or stolen and it has been filled.

Q The way that is done is that the number of the prescription blank that you receive is compared with the number that is actually on the computer tape, is that right?

A Right. To my knowledge, that's the way it's done.

Q So that the patient name is not needed in order to ascertain that information, correct?

A No, it's not needed.

Q The information contained on Plaintiffs' Exhibit 15 is of value to the Department of Health, is it not?

A Yes, sir, it is.

Q What is that information used for?

A We have been keeping track of the average rate of utilization of prescriptions by the various practitioners, both in the area of prescribing and dispensing, also determining the averages that are being filled by pharmacies specifically.

Q Is one of the uses so that you could compare those averages with any particularly suspicious doctor or pharmacy?

A This is not used on an individual focus basis. In other words, to focus on any particular physician, doctor, patient, you know, or pharmacy.

This is -- gives you a statistical summarization of the prescriptions that have been processed during the month and indicates to you which of the particular groups are making the greatest utilization of the prescriptions.

Q I understand that. But isn't it the case that one use for Exhibit 15 is to compare the average number of prescriptions per practitioner, for example, per MD, with any particular doctor in whom you are interested in order to ascertain whether that doctor falls above or below the average, and if he falls above

the average so that could make an appropriate investigation?

A This may be a utilization that we will be making. We are not currently doing that.

Q What are you currently using Plaintiffs' Exhibit 15 for?

A To determine the averages and to see if there are any changes in the averages from month to month.

Q Why are you interested in any changes in the averages from month to month?

A Well, we'd like to know if there is an increase or decrease in prescription utilization by the total averages or by practitioner group averages which might be indicative of a need for investigative follow-up for one thing or look into a given group.

Q Of course, for such an investigative follow-up, you would not need the patient names, isn't that right?

A No, I wouldn't say that. That would be a variable. We're speaking very generally now. That would not be true, I'm sure.

Q Exhibit 16 is a report of duplicate prescriptions processed in the month of February. What is that used for?

A That is used as a check on the possibility of a counterfeiting of the actual triplicate prescription form.

What this printout indicates to us is that there has been more than one prescription entered into the computer with the same serial number.

So we follow this up by means of going to the indicated batches and to determine whether it is a counterfeit prescription or whether it is some sort of processing error, either in our unit or the Key Punch Unit, or whether there is some other explanation for the duplicate entry with the same serial number in the system.

Q You would obtain Plaintiffs' Exhibit 16 even if the prescriptions that you received did not contain the patient's name, would you not?

A That's correct, sir. Designed to give only the prescription serial number and the batch number of the prescriptions.

Q Similarly you would be able to obtain Exhibit 15 without the names of the patients listed on the prescription, isn't that correct?

A That's correct. The patient names are not indicated on that. It's strictly statistical.

Q What is Exhibit 17 used for?

A I indicated to you that we're not making current utilization of that. We're not currently receiving that.

Q What is Exhibit 19 used for?

A This is in connection with our processing of application for triplicate prescription blanks wherein the patient names would not be involved.

Q Do Exhibits 19, 20 and 21 have any use other than in the processing of triplicate prescription information on the computer?

A No, these again relate the same as the prior exhibit to the processing of applications from practitioners for supplies of triplicate prescription blanks and would not involve patient names.

MR. LESCH: I have no further questions.

MR. FOGARTY: No further questions.

(Time noted: 4:35 p.m.)

Joseph L. Cannizzaro

Subscribed and sworn to before me

this 13 day of February, 1975.

C E R T I F I C A T E

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, WILLIAM BLITZ, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That JOSEPH L. CANNIZZARO, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 18 day of December, 1974.

William Blitz

WILLIAM BLITZ, CSR

I N D E X

WITNESSES

DEFENDANT'S	EXAMINATION BY	PAGE
Joseph L. Cannizzaro	Mr. Fogarty	3
		35
		134
	Mr. Leach (voir dire)	34
		64
		119
		140
	Mr. Jaffe	111

EXHIBITS

DEFENDANT'S TRIAL		FOR IDENT.
A	Memorandum dated March 8, 1974 entitled "Confidentiality of Records" from Joseph L. Cannizzaro to all non-bureau employees,	20
B	Memorandum dated March 11, 1974 entitled "Confidentiality of Records" from Joseph L. Cannizzaro to all employees in the Bureau of Controlled Substances Licensing,	20
C	Document headed "General Administration Manual" dated 2/27/74, Item 83,	21
D	Memorandum dated March 18, 1974 entitled "Access to the Vault and Security Area" from Joseph L. Cannizzaro to all employees of the Bureau of Controlled Substances Licensing,	31

EXHIBITS (cont'd)

DEFENDANT'S TRIAL		FOR IDENT.
E	Document headed "Bureau of Controlled Substances Licensing, Security of Information from Unauthorized Disclosure,"	33
F	Update of Plaintiffs' Trial Exhibit 18,	44
G	Document headed "Cashed Rx's Previously Reported Lost Or Stolen,"	47
H	Document headed "Bureau of Controlled Substances Licensing, Triplicate Prescriptions Record Retention, Purging of Prescription Files."	63

PLAINTIFFS' TRIAL		
42	Document dated March 22, 1973 on the letterhead of The State Commissioner of Health, Albany, New York.	83

oOo

Notice of Motions to Amend the Pre-Trial Order.

[SAME TITLE]

Sirs:

Please take notice that upon the annexed affidavit of A. Seth Greenwald, duly sworn to the 11th day of April, 1975, the undersigned will move this Court on the 25th day of April, 1975 in Room 705, at 10 o'clock in the forenoon, United States Courthouse, Foley Square, New York, New York for an order amending the pre-trial order to reflect the annexed schedule of defendant's exhibits placed in evidence on trial depositions, to further amend the pre-trial order as to print-outs including patient identity, to grant defendant's judgment on the close of plaintiffs' *prima facie* case and exclude the testimony of Joseph Wasserman as not having any foundation in plaintiffs' *prima facie* case and for such other and further relief as may be just and proper.

Dated: New York, New York, April 11, 1975.

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendant

By A. Seth Greenwald
Assistant Attorney General

Notice of Motions to Amend the Pre-Trial Order.

To: Shea, Gould, Climenko,
Kramer & Casey

Solomon Z. Ferziger, Esq.
Attorneys for Plaintiff Richard Roe,
et al.

Elizabeth B. DuBois
Legal Action Center
and
Norwick, Raggio & Jaffe
Attorneys for Plaintiffs-Intervenors
George Patient, et al.

Affidavit of A. Seth Greenwald, in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD ROE, an infant, by ROBERT ROE, his parent, et al.,

Plaintiffs,

and

GEORGE PATIENT, et al.,

Plaintiffs-Intervenors,

against

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York,

Defendant.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

A. SETH GREENWALD, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant herein and make this affidavit in support of the motions addressed to the Court.

I

The defendant is moving to amend the Pre-trial Order list of defendant's exhibits to reflect those introduced at the trial depositions. These consist of a Schedule annexed

Affidavit of A. Seth Greenwald.

Exhibits "A" through "N". These exhibits present a complete picture of defendant's use of triplicate prescriptions involving patient identity and security procedures designed to insure confidentiality of patient identity as required by law. Public Health Law (N.Y.) § 3371. It is submitted that the plaintiffs were not prejudiced by their use during trial depositions and the substance of these exhibits were all available to plaintiffs prior to trial. There is no "surprise" involved. They are an integral part of the testimony adduced by defendant and should be a part of the record of this case.

It should be emphasized that the introduction of these exhibits is in no way a concession that security or procedures of defendant is a proper issue. The plaintiffs utterly failed to show any breach of security as to triplicate prescriptions or even allege or testify that defendant has ever disclosed plaintiffs' identity from the processing or computerization of triplicate prescriptions in his custody pursuant to law.

II

During trial depositions some question came up as to receipt of computer print-outs including patient identity. (Testimony of Joseph Cannuzzaro). Defendant's Exhibit "F" is the only print-out *regularly* received with patient identity. However the pre-trial order should reflect that, on special request, print-outs on specific patients are produced. This, of course, is not a regular print-out.

III

As set forth in defendant's post-trial memorandum (Point I) the defendant should be granted judgment on the close of plaintiffs' *prima facie* case as they failed to

present an actual case of controversy or show standing to maintain the action. There was utterly no testimony defendant had ever disclosed any plaintiffs' identity, within or without the confines of the Public Health Law.

IV

Defendant is also moving to exclude the testimony of plaintiffs' security expert Joseph Wasserman, as his testimony had no foundation in plaintiff's *prima facie* case. As set forth in defendant's post-trial memorandum, Point II, pp. 27 *et seq.*, no plaintiff patient ever testified to lack of security as the basis of his "fears". Mr. Wasserman was testifying in a complete vacuum. His testimony should be excluded.

WHEREFORE, your deponent respectfully requests that the motions be granted.

(Sworn to by A. Seth Greenwald, April 11, 1975.)

Exhibit A, Defendant's Amended List of Trial Exhibits.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDEX NO.
73 Civ. 1303
(RLC—3 Judge Court)

RICHARD ROE, an infant, by ROBERT ROE, his parent, JOHN DOE, an infant, by MARY DOE, his parent, JAMES MOE, an infant, by MICHAEL MOE, his parent, JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

—and—

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTIST,

Additional Plaintiffs,

—against—

HOLLIS S. INGRAHAM, as Commissioner of Health of the State of New York,

Defendant.

A	Memorandum dated March 8, 1974 entitled "Confidentiality of Records" from Joseph L. Cannizzaro to all non-bureau employees,
B	Memorandum dated March 11, 1974 entitled "Confidentiality of Records" from Joseph L. Cannizzaro to all employees in the Bureau of Controlled Substances Licensing,

Exhibit A, Defendant's Amended List of Trial Exhibits.

C — Document headed "General Administration Manual" dated 2/27/74, Item 83,

D — Memorandum dated March 18, 1974 entitled "Access to the Vault and Security Area" from Joseph L. Cannizzaro to all employees of the Bureau of Controlled Substances Licensing,

E — Document entitled "Bureau of Controlled Substances Licensing Security of Information from Unauthorized Disclosure."

F — Print out entitled "Patients with Rx Total Dose in excess of 30 day supply processed in month of August."

G — Print out entitled "Cashed RXS previously reported lost or stolen."

H — Document entitled "Bureau of Controlled Substances Licensing Triplicate Prescriptions Record Retention Purging of Precription Files."

I — 4x6 salmon colored card with printing on it,

J — Document dated July 23, 1973 entitled "Confidentiality of Records."

K — Document dated July 27, 1973 entitled "Security Procedures For Operations Section of EDP."

L — Document dated July 31, 1973,

M — Document headed "Office Reference Manual, Item 2."

N — Document entitled "Confidentiality Of Information."

Order Substituting Defendant.

[SAME TITLE]

Upon the annexed affidavit of Michael Lesch, Esq., sworn to on August 18, 1975, it is

ORDERED, pursuant to Fed. R. Civ. P., Rule 25(d), that Robert P. Whalen, Commissioner of Health of the State of New York, be and he hereby is substituted as the defendant in the above entitled action in place and stead of his predecessor Hollis S. Ingraham; and it is further

ORDERED that the caption of the above action shall hereafter be as follows:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent; JAMES MOE, an infant by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER, and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

against

ROBERT P. WHALEN, as Commissioner of the State of New York Health Department,

Defendant,

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenors.

Dated: New York, New York, October 3, 1975.

s/ ROBERT L. CARTER,
U.S.D.J.

Final Order and Judgment (Reproduced at Jurisdictional Statement p. 14a).

Notice of Appeal (Reproduced at Jurisdictional Statement p. 18a).

Opinion Denying Stay, Justice Marshall (Reproduced at Jurisdictional Statement p. 39a).